In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 354.....

RAY RITTER, *et al.*,
Petitioners,

vs.

MILK AND ICE CREAM DRIVER AND DAIRY EMPLOYEES UNION, Local 336, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO, BRIEF IN SUPPORT OF PETITION and MOTION TO DISPENSE WITH PRINTING AND SERVICE OF PORTIONS OF RECORD.

CHARLES AUERBACH,
Leader Bldg., Cleveland, Ohio,
RAY T. MILLER,
Standard Bldg., Cleveland, Ohio,
Counsel for Petitioners.

CHARLES AUERBACH,
Of Counsel.

THE GONG LEGAL PUBLICATION CO., CLEVELAND, OHIO.

SUBJECT INDEX.

PETITION.

BRIEF.

AUTHORITIES CITED.

Cases.

Statutes.

Constitution.

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No.....

RAY RITTER, *et al.*,
Petitioners,

vs.

MILK AND ICE CREAM DRIVER
AND DAIRY EMPLOYEES UNION,
Local 336, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Your petitioners respectfully pray for a writ of certiorari to review the decision of the Supreme Court of Ohio in the above case.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The petitioners seek a review of the judgment of the Supreme Court of Ohio which dismissed their petition permanently to restrain the Milk and Ice Cream Drivers Union, Local 336, A. F. L., and approximately 150 dairy owners in Cleveland from carrying into effect an agreement and combination to deprive them of their supply of bottled milk for resale. The action was brought in the Common Pleas Court by approximately 50 of 300 independent milk dealers in Cleveland, Ohio, called "brokers," under

the Valentine Anti-Trust Act of G. C. O. 6390-1-3, *et seq.* and was based on an alleged conspiracy of the defendants to restrain trade unlawfully, create a monopoly in the marketing of milk in Cleveland, to fix prices and destroy petitioners' business in violation of law.

Upon dismissal, appeal was had, *de novo,* to the Court of Appeals for the Eighth District of Ohio, where new and additional evidence was introduced but injunction denied. The appeal from this decision was denied by the Supreme Court of Ohio, and the motion to certify overruled.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28 U. S. C. Section 344 (b), Section 237-(b) of the Judicial Code as amended by the Act of February 13, 1925 and March 8, 1939. Judgment of the Supreme Court dismissing the petition of the appellants as of right was entered May 1, 1940, two Justices not concurring. The application for rehearing was denied on May 22, 1940.

THE QUESTIONS PRESENTED.

1. This case presents the question whether the provisions of the Ohio Valentine Anti-Trust Act, Sections 6390 *et seq.,* as construed and applied by the Court below, whereby the petitioners were excluded from protection against a combination formed to restrain trade, create a monopoly and destroy their business of buying and selling milk for profit, violated the due process or equal protection clauses of the 14th Amendment.

2. This case presents the further question whether the combination among the defendants to deprive the petitioners of their supply of bottled milk was an interference with Interstate Commerce in violation of Article I, Section 8 of the United States Constitution.

3. Can independent business men, such as petitioners, who are not employees, be made the basis of a labor dispute between employers and labor unions?

4. Are fixing and maintaining prices, eliminating competition, creating a monopoly and restraining trade in the sale and purchase of milk and dairy products, such incidents of a labor union's relation with employers as to entitle it to enter into an agreement and to combine with them to carry out any or all of said purposes?

5. Is it the "order of the day" for small corner grocery stores, drug stores and individual business men such as petitioners, to be annihilated by "chain stores" as was enunciated by the Court of Appeals and affirmed by the Court below on the theory that it is incidental to a lawful union purpose?

6. Is it within the province of a labor union to cloak an illegal combination to restrain trade in the guise of a claimed labor dispute?

7. Are fixing and maintaining prices, eliminating competition, creating a monopoly and restraining trade in the sale and purchase of milk and dairy products, such incidents of a labor union's relation with employers as to afford it and the employers through it immunity from antitrust laws when it enters into an agreement with them to carry out any or all of said purposes?

STATUTES INVOLVED.

General Code of Ohio Sections 6390-91-93, *et seq.*—Appendix, *infra.*

LEADING FACTS SHOWN BY THE RECORD.

In October, 1937 the milk dealers' union entered into an agreement with approximately 140 dairy owners in Cleveland. Ex. 3 (1-166). There were then in Cleveland about 146 dairies. (R. 536; N. S. 26.)*

---

* R.—refers to pages in typewritten Record.
N. S.—refers to Narrative Statement.

By this contract:

1. The union was given the exclusive sale and distribution of all milk and dairy products of each dairy signatory to said contract. (Articles 1, 34, Ex. 3.)

2. No person owning his own truck and route and conducting his own milk business could join the Union. (Article 1, Ex. 3.)

3. The price at which deliverymen were to sell milk was to be 12¢ per quart retail and 10¢ per quart wholesale. This the respondents claim was to become the basis for computing commissions.

The admitted effect of this contract was stated by counsel for the Union and The Telling Belle Vernon Company to be for each dairy owner signatory thereto to cease selling bottled milk to independent owners of trucks, called brokers, who bought bottled milk from dairies and sold it to stores and consumers. (Brief of Court of Appeals, T. B. V.) and (R. 863; N. S. 33.) Because of this, the Union representatives stated the brokers would be eliminated from competition. (R. 563; N. S. 28.) There were in Cleveland in 1937, 2400 members in the Union (R. 566; N. S. 28) and 300 or more brokers. (R. 455, 464; N. S. 19.) (R. 833; N. S. 31.)

Pursuant to this agreement, all dairies having contracts were notified by the Union that after May 1, 1938, brokers were not to be supplied with bottled milk. One dairy supplying approximately 45 to 50 such brokers posted a notice (Pltff. Ex. 1) advising that contracts to supply them with milk would terminate by reason of this agreement. The brokers frantically sought a method of remaining in business but were advised by Union officials that their agreement with the companies was that brokers were to be eliminated (R. 485-6), that there was no way open for them except to sell their equipment, get jobs and

become members of the Union. (R. 486; N. S. 22 and 23.) This required earning a minimum of $140.00 per month by each broker, since under the contract each employer agreed to pay retail drivers a minimum of $140.00 per month. (Ex. 3.)

Not desiring to quit business in which many had engaged long before the Union came into being in 1933, and the Union being closed to them, the brokers on April 22, 1938, filed suit in the Common Pleas Court of Cuyahoga County, seeking to restrain the defendants from putting into effect this agreement. In their petition the plaintiffs claimed that the Union and the defendant dairies entered into an unlawful combination and conspiracy to create a monopoly, which, unless restrained, would enable them to fix and maintain the price of milk, eliminate competition, restrain trade and destroy the plaintiffs' business by shutting off their supply of bottled milk in violation of the Valentine Anti-Trust Act of Ohio; that unless the defendants were enjoined, they had no adequate remedy at law.

In 1930 the Common Pleas Court of Cuyahoga County restrained the Telling Belle Vernon Company and numerous persons named defendants in this case from carrying into effect an agreement to restrain trade and create a monopoly in Cleveland. *Clover Meadow Creamery Co. v. National Dairies et al.*, 29 O. N. P. N. S. 243. In that case as in our case, a "card" price was involved. In 1933 the milk drivers' union was formed and obtained contracts from dairy owners which continued through September 30, 1937. On September 8, 1937 a committee representing the Union met with a committee representing the dairies to formulate a new agreement. (R. 770; N. S. 117.)

From their inception the discussions leading to the agreement turned to the need of policing the milk industry against price cutting. Although many other subjects were discussed by the two committees, nevertheless, the "problem" of the broker, his influence upon the business and the need for his elimination was thoroughly discussed.

The motive prompting the destruction of the broker's business was stated to be his ability to sell milk at 2¢ less than the large distributors who spent that sum per quart for advertising purposes. (R. 747; N. S. 100.) This was the "evil" which the dairies and Union decided to root out (R. 686; N. S. 55, 56, 107, 108), but feared the anti-trust law. The brokers were selling 30,000 quarts of milk per day. (R. 670; N. S. 44.) During the negotiations the whole question was summarized as follows (R. 756; N. S. 107, 8):

> "Mr. Rohrich: (Union representative) On the other hand, you appreciate the thing we are trying to do.
>
> Mr. Baxter: (Employers' representative) I do. We are in favor of it.
>
> Mr. Gibson: (Employers' representative) You are after more than some items of income for your men. You would like to see the prices leveled, wouldn't you?
>
> Mr. Rohrich: Yes, why not?
>
> Mr. Baxter: (Employers' representative) So would I.
>
> Mr. Rohrich: You would. We want to help you do it. We are trying to find a way to do that without getting into difficulty.
>
> Mr. Seegert: (Milk Dealers Fraternal League representative) I think we are in accord.
>
> Mr. Baxter: I could do that. It would not work very much of a hardship.
>
> Mr. Rohrich: I might just as well answer you by saying, no, we don't give a damn about your industry, we are only interested in our men, but that is not so. We are interested in these things. They are of importance to the industry. It is just like the individual peddler has been in the ice industry, and in the bakery industry on that. You had a lot of it in the milk industry in the old days. You have done away with it now."

Therefore, the Union argued if it were to build up the industry and bind its officers to eliminate price cutting, it wanted something in return (R. 738-9; N. S. 93, 94, 95)

as well as the means in a written contract to accomplish it. (R. 738-9; N. S. 93, 94, 95.)

The Union agreed to assume full responsibility for any charge of price fixing. (R. 754; N. S. 105.) It stated it was trying to make it possible for all competitors in the milk industry to sell milk at twelve cents per quart. Through this medium, all competitors would be compelled to bring their prices up or go out of business. (R. 754.) Drivers could even get 13¢ per quart. (R. 778; N. S. 122.)

The Union secretary pointed out that in the preceding year or two it had "policed" the industry against underselling (R. 764, 5, 6, 7, 8; N. S. 112, 13, 14):

1. By picketing small retail stores with whom it had no controversy but who advertised milk at one cent lower than the delivery price. (The signs came down.)

2. By cutting off the milk supply from such retail stores through dairies it served.

3. By combining with the Fraternal League, an organization of numerous milk dealers in Cleveland, to keep prices fixed.

The activity affected small fruit stores, grocery stores, bakery shops and similar small business men.

Having been helpful in eliminating price cutting in small stores, it was agreed that through a combination of the Union and the Cleveland dairies, underselling by brokers could likewise be controlled (R. 780; N. S. 123) if the Union had a closed shop agreement.

The brokers had to obtain bottled milk or lose their business. (R. 452, 3; N. S. 18.) Therefore, to eliminate them, their supply had to be cut off. That this would tend to create a monopoly in the hands of The Telling Belle Vernon Company and three or four other large dealers was discussed and feared by some members of the committee. (R. 745; N. S. 99.) That it might cause a loss of

employment was likewise suggested. (R. 745; N. S. 99.) The business of the broker would be sought by Telling Belle Vernon and others. (R. 339; N. S. 4.)

Cleveland obtains its milk supply from sources within a radius of one hundred miles of the city. (Statement of Diltz, R. 819, 20; N. S. 13.) A proposal by an individual from Pennsylvania to open a dairy in Cleveland, employ the brokers about to be eliminated and unionize them, brought the assurance from Union officers that no such thing could happen because "that man would have to get milk into Cleveland first." (R. 692; N. S. 59-67.) This, it may be inferred, the Union through its affiliates would not permit. Even a cooperative dairy owned by brokers could not open because they would be prevented from getting milk into Cleveland. (R. 680; N. S. 63, 64.) In this the Fraternal League, representing numerous dairy owners in Cleveland, coincided. (R. 692, 7; N. S. 59-67.)

The Union and the employers agreed that the broker had to be eliminated. They feared putting such provision into the agreement, but counsel for the Union assured them that he could set it up legally. (R. 687; N. S. 56.) The final agreement made no mention of the brokers, but Articles 1 and 34 were so drawn as to make it impossible for them to stay in business.

One hundred twenty dealers, or 75-80% of all dairy owners in Cleveland, approved this agreement at a meeting called for that purpose (R. 370, 1; N. S. 8), and approximately 140 dairies in Cleveland signed such agreements, all identical in terms. (R. 536; N. S. 25) (Ex. 3, 166.) Altogether there were 146 dealers in Cleveland. (R. 536; N. S. 26.)

One dairy owner signed an agreement out of fear that if he did not "the Union would surround the dairy and blow it up." (R. 601-611; N. S. 29.) Some brokers attempted to sell their routes and trucks, but could not do so. (R. 886; N. S. 34, 54.)

Box lunch operators supplying factory workers during lunch hours were advised that they would receive no milk after May 1, 1938. Others, who were in business for years, claimed they would be deprived of the means of earning a livelihood if the contract went into effect. (R. 834-5; N. S. 31, 32.)

JUDGMENT OF THE SUPREME COURT OF OHIO and OPINION OF THE COURT OF APPEALS.

The matter was presented to the Court of Appeals, which held that the elimination of the 300 or more independent milk dealers from competition and the destruction of their business was a mere incident to an otherwise lawful purpose, namely, the creation of a "closed shop." It declared:

> "With the right to insist upon a closed-shop contract, and the right to bargain as to wages, it is doubtful if anyone would challenge the legality of this contract but for the seeming calamity to the Brokers. *Of course, the Brokers may sell their equipment and routes, or they may seek other sources of supply, or join the Union and drive and sell for the Dealers direct.* It should be noted that this contract makes no reference to Brokers. *Their misfortune is a mere incidental consequence, if the contract be otherwise legal.*" (Emphasis ours.)

> "Seldom does a large factory or industry establish a closed shop that there are not some victims strewn along the pathway, victims in the sense that the sphere and opportunities of employment to the non-union man are restricted or extinguished. Unlawful conspiracy cannot and should not be inferred from the fact alone that some brokers are without the Union and dealers negotiated and executed in adjusting their labor relations. *Many a former corner grocery and drug store has been annihilated in the evolu-*

> *tion and growth of the chain stores. It seems to be the order of the day."* (Opinion of Court of Appeals in Record.)

In their brief in the Court of Appeals petitioners asserted their constitutional rights. (Page 5, brief of plaintiffs-appellants in Court of Appeals.)

By assignments of error, 7, 19, 20, 21 in the Supreme Court of Ohio, the petitioners claimed in their appeal as of right that they were denied equal protection of law and due process under the 14th Amendment to the United States Constitution and that there was an interference with Interstate Commerce under Article I, Section 8 of the United States Constitution.

All these questions were argued in the brief of petitioners in the Supreme Court of Ohio and upon oral hearing. On May 1, 1940 the Supreme Court of Ohio ruled as follows:

> "It is ordered and adjudged that said appeal as of right be and the same is hereby dismissed for the reason no debatable constitutional question is involved in said cause."
>
> *Ritter et al. v. Milk & Ice Cream Drivers and Dairy Employees Union et al.*, 136 O. S. 582; Ohio Bar May 13, 1940.

Two of the seven justices failed to concur in this order.

The Motion to Certify was overruled.

The Supreme Court of Ohio rendered no opinion and made no finding of facts.

The Court of Appeals made no finding of facts, but rendered an opinion which may be found in the Record.

REASONS FOR GRANTING THE WRIT.

Proposition 1.

The petitioners contend that the court below has decided a question of law of widespread importance to individuals, independent entrepreneurs and labor unions in a way which is untenable and is probably in conflict with the weight of authority.

Truax v. Corrigan, 257 U. S. 312;
U. S. v. Brims, 272 U. S. 549;
Meadowmoor v. Milk Drivers' Union, 371 Ill. 377;
Lake Valley Farm Products, Inc. v. Milk Wagon Drivers' Union, Local 753, 108 Fed. (2d) 436.

Proposition 2.

In *Meadowmoor v. Milk Drivers' Union, supra,* the Supreme Court of Illinois held directly contrary to the holding by the Supreme Court of Ohio in the instant cause. Until this question is decided by this Court, there will exist substantial confusion among many groups in industry, business and labor in many states as to what is "the order of the day" relating to such matters as are involved herein.

The decision of the court below is in conflict with applicable decisions of this Court:

See United States Supreme Court cases cited in support of Proposition 1, and

Duplex Printing Press Company v. Deering, 254 U. S. 443;
Eastern States Lumber Association v. United States, 234 U. S. 660.

Proposition 3.

The decision of the court below in so construing and applying the provisions of the Valentine Anti-Trust Act, G. C. O., 6390 *et seq.,* as to exclude peti-

tioners from the protection of the Act which condemns a combination and monopoly in illegal restraint of trade, the purpose and effect of which is to deprive the petitioners of their right to do business while affording protection to others in similar circumstances, is arbitrary, unreasonable and deprives the petitioners of due process and equal protection of the laws in contravention of the 14th Amendment to the Constitution of the United States.

Connolly v. Sewer Pipe Co., 184 U. S. 540;
Truax v. Corrigan, 257 U. S. 312;
Smith v. Cahoon, 283 U. S. 567;
Barbier v. Connolly, 113 U. S. 27;
Beidler v. South Carolina Tax Commission, 282 U. S. 1.

Proposition 4.

The decision of the court below in holding that the interference with the sale of milk in the City of Cleveland does not affect Interstate Commerce is in conflict with decisions of this Court.

Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197;
Curran v. Wallace, 306 U. S. 1;
U. S. of America v. Rock Royal Cooperative, Inc., 307 U. S. 533;
National Labor Relations Board v. Jones & Laughlin, 301 U. S. 1, 37;
Loewe v. Lawlor, 208 U. S. 274.

Proposition 5.

The decision of the court below is in conflict with numerous decisions of this Court holding that labor unions may not be used as a cloak to shield illegal activities.

See cases in support of Proposition 2, and

U. S. v. Brims, 272 U. S. 549;
Coronado Co. v. United Mine Workers, 268 U. S. 295.

Proposition 6.

This Court has before it two other phases of this controversy:

1. On June 3, 1940 this Court granted certiorari in *Milk Wagon Drivers' Union of Chicago v. Meadowmoor Dairies,* wherein was involved the conflict in the method of distributing milk by "vendors" and union drivers upon the theory that the decision of the Supreme Court of Illinois deprived the Union of the constitutional right to free speech when it was enjoined from picketing stores supplied by vendors.

2. On April 1, 1940 this Court granted certiorari to the same labor union, where there was involved the conflict in the method of distributing milk between a union and a dairy supplying vendors on the theory that enjoining picketing involved the same clauses of the 14th Amendment.

Milk Wagon Drivers' Union v. Lake Valley Farm Products, No. 20, October Term, 1940.

Our case involves the identical conflict in the method of distributing milk. The vendors "or brokers" are seeking to retain their right to buy and sell bottled milk for profit, and the Union and Cleveland dairy owners wish to deprive them of that right, thus involving their constitutional guarantees to due process and equal protection of the law under the 14th Amendment.

It is respectfully urged that if enjoining the right to picket by a labor union is a violation of the clause of the 14th Amendment relating to free speech, depriving the petitioners of the right to do business and excluding them from the benefits of the anti-trust laws are no less violations of the same amendment relating to equal protection and due process.

THIS COURT HAS JURISDICTION.

The record discloses that the Supreme Court of Ohio considered and decided the Federal question raised by the assignments of error. An order of the Supreme Court of Ohio, dismissing a writ of error from an intermediary Appellate Court on the ground that no debatable constitutional question is involved, is considered to be an affirmance and the order of dismissal is the judgment reviewable in this Court. *Mathew v. Huwe,* 269 U. S. 262; *Van Heufel v. Harkelrode,* 284 U. S. 225; *Titus v. Walleck,* 306 U. S. 282.

The Federal question was necessary to a complete determination of this cause. Without it there could be no decision. The Valentine Act was the basis of the action. The petitioners claimed a violation thereof by respondents by a scheme to deprive them of their business. They claimed protection under the Valentine Anti-Trust Law. Excluding them from the benefits of this Act involved their rights guaranteed them by the 14th Amendment, both as regards equal protection and due process. Definitely, then, the Federal question is so interwoven in the court's decision as to bring it clearly within the jurisdiction of this Court. *Senn v. Tile Layers Union,* 301 U. S. 468.

It may be argued that the court found factually against the petitioners. If so, this would not defeat the jurisdiction of this Court.

State of Indiana v. Brand, 303 U. S. 95, 98;
Virginia v. The Imperial Co., 293 U. S. 15, 16, 17;
Grayson v. Harris, 267 U. S. 352, 358.

It is well settled that this Court will not permit the foreclosure of claimant's constitutional rights because of the State Court's finding of fact, which would preclude jurisdiction. This Court will examine the facts to see whether the evidence adequately sustains the findings.

Davis v. Wechsler, 263 U. S. 22, 24;
Truax v. Corrigan, 257 U. S. 312;

King v. Putnam Investment Co., 248 U. S. 23, 39;
Ward v. Love, 253 U. S. 17, 23.

Thus this Court has said:

> "If the Constitution and Laws of the United States are to be enforced, this court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right, or to bar the assertion of it even upon local grounds." *Davis v. Weschsler, supra*, 24.

The jurisdiction of this Court to protect constitutional guarantees is "a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the Laws made in pursuance thereof." *Ward v. Love, supra.*

Neither the court below nor the intermediary Appellate Court made a finding of facts in the instant cause, although both courts drew conclusions from facts. This will not defeat the jurisdiction of this Court. This brings our case within the rule that the Supreme Court of the United States will review the facts to ascertain whether the litigant's Federal constitutional rights were violated where the state court makes a general or ultimate conclusion of fact.

Norfolk Ry. Co. v. Connolly, 236 U. S. 587, 590.

Where a conclusion of law as to a federal right and finding of fact are so intermingled as to make it necessary in order to pass upon the federal question to analyze the facts, this Court will do so.

Fiske v. Kansas, 274 U. S. 380, 385, 396;
Beidler v. South Carolina, 273 U. S. 548;
Aetna Life Insurance Co. v. Dunken, 266 U. S. 389;
Kansas City Southern Ry. Co. v. C. H. Albers Commission Co., 223 U. S. 573.

The case at bar further is not subject to the rule of "non-federal ground."

The decision is that the petitioners may be deprived of their means of earning a livelihood as entrepreneurs for several reasons of law, among them that "it is the order of the day." This does not turn upon a question of fact and it involves a very important principle of law. Whether this is so or not is a matter of law and is of interest not only to the litigants at bar, but to the nation as a whole. The Supreme Court of Illinois in the *Meadowmoor* case, *supra,* has held the contrary.

Acme Harvest Co. v. Bukman, 222 U. S. 305, 306.

Even if there existed a non-federal ground, it was not adequate to support the decision of the court below. The adequacy of the non-federal ground is for this Court to determine in order to safeguard the litigant's constitutional guarantees.

Abie State Bank v. Bryan, 282 U. S. 765, 773;
Brood R. Co. v. South Carolina, 281 U. S. 537, 540.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari issue to review the decision and judgment of the court below.

CHARLES AUERBACH,
RAY T. MILLER,
Counsel for Petitioners.

CHARLES AUERBACH,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No.....

RAY RITTER, *et al.*,
Petitioners,

vs.

MILK AND ICE CREAM DRIVER
AND DAIRY EMPLOYEES UNION,
Local 336, *et al.*,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT.

The opinion of the Court of Appeals for the Eighth District of Ohio is printed *in toto* in the record. The Supreme Court of Ohio rendered no opinion.

II.

STATEMENT OF THE CASE.

The facts, rulings of the courts below and questions presented are set forth in the foregoing petition, pages 1 to 15 inclusive, thereof.

III.

SPECIFICATIONS OF ERROR.

The Supreme Court of Ohio erred:

1. In dismissing petitioners' appeal as involving no debatable constitutional question.

2. In holding that it was not a violation of the 14th Amendment to the United States Constitution to create a combination by which petitioners were deprived of the means of engaging in business independently and making them ineligible to join a union unless they earned $140.00 per month as employees.

3. In holding that the rights of the petitioners to equal protection of the law under the 14th Amendment to the United States Constitution were not violated when they were excluded from the protection of the Valentine Anti-Trust Act of Ohio against an illegal combination to deprive them of their business while affording such protection to others similarly situated.

4. In so construing the Valentine Act as to make an unreasonable and arbitrary discrimination against the petitioners, by excluding them from the benefits of the Act against an illegal combination in restraint of trade formed to destroy their business.

5. In failing to find that the defendants conspired unlawfully to deprive the petitioners of their right to carry on a lawful business in violation of the 14th Amendment to the United States Constitution.

6. In failing to hold that the agreement and combination of the defendants interfered with Interstate Commerce.

7. In holding that independent business men, such as petitioners, may be made the basis of a labor dispute between employer and employee, allowing them to combine to destroy their business, if it be the result and not the primary purpose of their agreement.

8. In holding that a Union may induce or coerce an employer to cease dealing with those with whom it has no labor dispute upon the threat of strike.

9. In holding it to be "the order of the day" for small corner grocery stores, drug stores and individual business men to be annihilated by "chain stores."

SUMMARY OF ARGUMENT.

POINT I.

THE SCHEME OF ACTION BY THE LABOR UNION IN THE INSTANT CASE, OF COMBINING WITH EMPLOYERS TO CREATE A MONOPOLY, FIX PRICES, STIFLE COMPETITION, RESTRAIN TRADE AND DESTROY THE PETITIONERS' BUSINESS, IS ILLEGAL AND ENJOINABLE.

A. If the object of a combination be unlawful, even though the means employed in furtherance thereof be lawful, it may be enjoined.

B. The scheme involved an illegal boycott and should have been enjoined.

POINT II.

THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION UNDER THE 14th AMENDMENT WILL NOT PERMIT THE EXCLUSION OF THE PETITIONERS FROM PROTECTION AFFORDED BY THE PROVISIONS OF THE VALENTINE ANTI-TRUST ACT OF OHIO AGAINST ILLEGAL MONOPOLIES AND COMBINATIONS IN ILLEGAL RESTRAINT OF TRADE, WHILE GRANTING IT TO OTHERS IN SIMILAR CIRCUMSTANCES.

A. Excluding the petitioners from the benefits of the Act involves the 14th Amendment.

B. The 14th Amendment protects the constitutional guarantees from judicial impairment of State courts as fully as from impairment of other departments of State government.

POINT III.

THE SCHEME IN THE INSTANT CASE INVOLVED ILLEGAL RESTRAINT UPON INTERSTATE COMMERCE.

ARGUMENT.

POINT I.

THE SCHEME OF ACTION BY THE LABOR UNION IN THE INSTANT CASE, OF COMBINING WITH EMPLOYERS TO CREATE A MONOPOLY, FIX PRICES, STIFLE COMPETITION, RESTRAIN TRADE AND DESTROY THE PETITIONERS' BUSINESS, IS ILLEGAL AND ENJOINABLE.

With the legitimate objects of a Labor Union no one can have any quarrel. The rights of labor to organize and bargain collectively to secure higher wages, shorter hours and better working conditions, are fully recognized and protected by law. When, however, a Union undertakes to go beyond such lawful purposes and joins with others to impair a free economy, to restrain trade, fix prices, create a monopoly and destroy the business of others, it cannot avoid the legal consequences of such a combination by extolling before the courts its virtues and its noble purposes or by declaring that its intentions and primary purposes were for good and not for evil.

Duplex Printing Press Co. v. Deering, 254 U. S. 443;
U. S. v. Brims, 272 U. S. 549;
Loewe v. Lawlor, 235 U. S. 522;
Eastern States Retail Dealers Assoc. v. U. S., 234 U. S. 613.

A. If the object of a combination be unlawful, even though the means employed in furtherance thereof be lawful, it may be enjoined.

See cases above cited, and

Curran v. Galen, 152 N. Y. 33;
Bedford Cut Stone v. Stone Cutters Association, 274 U. S. 37.

The Supreme Court of Ohio took the view that the scheme was not unlawful because it was incidental to a lawful purpose, to wit: the creation of a "closed shop."

Thus was extended the closed shop principle to affect non-employes who are not eligible to union membership. In other words, if capital and labor combine to carry out the destruction of a competitive business, all they need do is to indicate that their primary purpose and intention was to create a closed shop, that the destruction of the business of non-combatants is merely incidental and the scheme has legal foundation. We submit that this places in the hands of industry a powerful means of oppression denied to governmental agencies much less to private enterprise. Constitutional guarantees could by this method become meaningless. This Court has in several instances declared against such activity. (See cases above cited.)

Such program by industry alone is clearly in violation of State Anti-Trust Laws and the Sherman Act, where Interstate Commerce is involved.

U. S. v. Trenton Potteries Co., et al., 273 U. S. 392;
Interstate Circuit v. U. S., 306 U. S. 208.

The infusion of a labor union into this scheme does not exonerate the participants, especially as in the instant case, when one of the claimed objects of the agreement relied on to add color of legality to the scheme, to wit, a "closed shop," was stated by a union officer to be unnecessary for union needs, but that it was vital to employers to carry out the purposes of the scheme. Destroying the business of petitioners and thereby assisting dairy owners to create a monopoly, fix prices and enable them to perpetuate a method of milk distribution more costly to the consumer, is not a labor union's legitimate concern.

Cases above cited, and

Local 167 I. B. T. v. U. S., 291 U. S. 293;
Scavenger Service Corp. v. Courtney, 85 Fed. (2nd) 825, 837.

"The conspiracy was one to ruin appellants; therefore the means adopted were unlawful * * * if, therefore, individuals conspired to commit the wrongful

act of ruining plaintiff's business, the means, even though of themselves innocent, were actionable. Aside from whether the picketing was peaceful, it was unlawful (*American Steel Foundries v. Tri-City Central Trades Council,* 257 U. S. 184); it was unlawful when its object was as here disclosed." *Scavenger Corp. v. Courtney,* 85 Fed. (2) 825, 837.

Since the scheme of the Defendants' Union had for its effect, as well as for its purpose, the destruction of the rights and means of others to carry on a lawful business, it cannot be justified as having been done to advance its own cause or to further its own purposes. (Cases above cited), and

U. S. v. Borden, 84 L. E. 143.

B. The scheme involved an illegal boycott.

The claim that the agreement was made because of union insistence upon the threat of strike involved the use of an illegal boycott against these petitioners and the means employed were illegal.

Duplex Printing Press v. Deering, 254 U. S. 443;
Truax v. Corrigan, 257 U. S. 312, 330;
Bedford Cut Stone v. Stone Cutters Assoc., 274 U. S. 37;
Scavenger Service Corp. v. Courtney, 85 Fed. (2nd) 825, 837.

Between the brokers and the Defendant Union there existed no labor dispute. *Crosby v. Rath,* 136 O. S. 352. The Union therefore could not insist that dairy owners henceforth cease supplying brokers with bottled milk. The owners were free to enter into an agreement with the Union regarding wages, hours and working conditions of employes, but they could not be compelled upon threat of a strike to enter into an agreement prohibiting them from selling bottled milk to brokers, grocers, druggists, or to anyone else who chose to purchase milk at the dairy and

pay for it. See cases above cited under Paragraph 1 this subdivision, and

Toledo A. A. & N. M. Ry. Co. v. Penna. Co., et al., 54 Fed. 730.

POINT II.

THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION UNDER THE 14th AMENDMENT WILL NOT PERMIT THE EXCLUSION OF THE PETITIONERS FROM PROTECTION AFFORDED BY THE PROVISIONS OF THE VALENTINE ANTI-TRUST ACT OF OHIO AGAINST ILLEGAL MONOPOLIES AND COMBINATIONS IN ILLEGAL RESTRAINT OF TRADE, WHILE GRANTING IT TO OTHERS IN SIMILAR CIRCUMSTANCES.

The petitioners claimed that by the scheme of action of respondents in the present case, they were deprived of the means of earning a livelihood in that they were prevented from buying bottled milk for resale from dairy owners in Cleveland, or from sources outside the State of Ohio, and they could not join the Union because they were ineligible to membership as "brokers." Under the provisions of the Valentine Anti-Trust Act, such an agreement is illegal as creating a monopoly and restraining trade unlawfully.

Thus, in Ohio, it has been said of such schemes:

> "There are certain transactions, however, which repeatedly and upon clear grounds have been held to be illegal. For the most part, these are contractual arrangements, having the direct purpose of fixing prices, establishing monopolies or stifling competition, or which, being merely incidental to some lawful transaction, are unreasonable in scope or materially prejudicial to public interests. No Ohio decision has upheld a transaction whose purpose was to fix prices or establish a monopoly or, with one exception, whose sole purpose was to reduce competition." 27 *O. Jur.* 170.

Admittedly, the agreement and combination in the instant case oppressed the brokers and suppressed their competition; there being 2400 Union drivers in the Union and only 300 or more independent brokers in Cleveland, the only bulwark against a fixed "card" price of milk and the complete control and domination over the marketing thereof, was this independent broker group, which had to be eliminated if a monopoly were to be created. The evidence was conclusive that the Union's purpose was not alone to obtain higher wages; one of its prime objects was to create a monopoly, fix prices and help the dairy owners in doing so. This, being clearly in violation of the provisions of G. C. O. 6390-91-93 *et seq.*, the respondents should have been enjoined and the petitioners given the benefits of the act. However, by the lower court's interpretation of the act, the petitioners were excluded and denied the benefits thereof. Such exclusion, we respectfully urge, was unreasonable, arbitrary and discriminated against these petitioners, denied them due process and deprived them of the equal protection of the laws guaranteed by the 14th Amendment to the United States Constitution.

Connolly v. The Union Sewer Pipe Co., 184 U. S. 540;
Truax v. Corrigan, 257 U. S. 312, 335;
Barbier v. Connolly, 113 U. S. 27, 31;
Liggett v. Baldridge, 278 U. S. 105, 111;
Smith v. Cahoon, 283 U. S. 553, 567.

The 14th Amendment protects the constitutional guarantees from judicial impairment of State courts, as fully as from impairment by other departments of government. The court, being an instrumentality of the State, is subject to the same scrutiny against impairing constitutional rights of individuals, as is the State itself. Its action is State action.

> "Whoever by virtue of a public position under a State Government deprives another of property, life or liberty, without due process of law, or denies or takes

away the equal protection of the laws, violates the constitutional inhibition and as he acts in the name of and for the State and is clothed with the State power, his act is that of the State. This must be so or the constitutional provision has no meaning." *Ex parte, Va.*, 100 U. S. 339, 347.

The due process clause has been construed to apply to all State action, whether legislative, executive or judicial. Judicial infringement of individual rights has been repeatedly denounced by this Court.

Brinkerhoff-Faris Trust Co. v. Hill, 281 U. S. 673.

This Court has determined in *Truax v. Corrigan* that a union cannot combine with employers to carry out restrictions in trade or commerce. The Ohio Supreme Court has held in the instant case that this may be done as being merely incidental to a lawful Union purpose and therefore excluded the petitioners from the benefits of the Anti-Trust Act. While the State Court can and does have final determination of what is the law of the State, it cannot make a final decision when the law so determined impairs rights guaranteed by the United States Constitution. Final determination of such rights is with this Court; otherwise, "the Constitution of the United States would be different in different states and might perhaps never have precisely the same construction, obligation or efficacy in any two states."

Martin v. Hunters Lessees, 1 Wheat. 304, 308.

And so the court said in *Barbier v. Connolly*, 113 U. S. 27, 31—

> "* * * The 14th Amendment * * * undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they

should have like access to the courts of the country for the protection of their persons and property, the preservation and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition."

The injury to the petitioners due to the discrimination against them is not imaginary or sentimental, but is a direct and vital violation of their constitutional rights. The admitted effect of the agreement was to prohibit the sale of milk to them for re-sale. The scheme included the prevention of a supply reaching them from outside of the State of Ohio. Union membership was closed to them as brokers. A more iron-clad and more efficient encirclement of individual entrepreneurs for the purpose of annihilating them and their means of earning a livelihood cannot be imagined. If this scheme succeeds, the brokers are finished—as Mr. Sechler stated—"You had that in the bakery industry and the ice industry, * * * you have done away with it now." (N. S. 5.)

It cannot be argued that such classification is reasonable, or that it is socially beneficial. The brokers are not pariahs or outcasts from society; they serve a distinct social purpose. While in many instances they earn less than $140.00 per month, in many instances they fare better than union drivers; they serve many persons who otherwise would find it difficult or impossible to obtain milk, such as factory workers. They supply housewives with products identical in quality as those served by advertising dairies at 2¢ less per quart, by substituting personal solicitation for advertising media, thus eliminating that cost. They stand in the way of a complete control and domination over the marketing and the price of milk by large dealers and the creation of a monopoly, there being approximately 300

brokers as against 2400 Union employes in Cleveland. Not one reason can be given for their elimination and destruction other than it would benefit the large distributors of milk and perhaps, indirectly, the Union. This is not enough, we urge, to drive 300 or more small business men out of business and deprive them of the means of earning a livelihood.

POINT III.

THE SCHEME INVOLVED ILLEGAL RESTRAINT UPON INTERSTATE COMMERCE.

Cleveland obtains its milk from producers within a radius of 100 miles of the city. It is called Cleveland's Milk Shed. This, therefore, brings Cleveland into the Western Pennsylvania milk market. During the negotiations when a Pittsburgh individual offered to open a cooperative dairy in Cleveland, employ the brokers and have them join in the Union, the Union Secretary assured the dairy owners that this could not happen because, if a dairy were opened, it could not bring milk into Cleveland.

Activities intra-state in character because of their close proximity and effect upon interstate commerce, may be considered a part thereof.

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 37;

Houston, E. & W., T. R. Co. v. U. S., 234 U. S. 342, 51, 52.

The controversy here arises because of the objection to the method employed by the brokers in distributing milk, namely, that of buying at the dairy for resale to the consumer. The Union claimed it affected its drivers; the dairy owners could not maintain a card price; both agreed the broker and his method of distribution were inimical to their interests and had to be eliminated. Baxter and others of the employers group were seeking some method whereby this could be accomplished legally. The Union

sought the same thing. Both groups found the way through this contract, which admittedly forebade sales of bottled milk to the brokers by those holding contracts with the Union. This included virtually all of the dairies in Cleveland. This Court has repeatedly held that combinations and conspiracies which limit third persons against engaging freely in Interstate Commerce or compel them to conduct such commerce only in a certain way involuntarily, create a burden upon Interstate Commerce.

Local 167, I. B. T. v. U. S., 291 U. S. 37;
Duplex Printing Press v. Deering, 254 U. S. 443;
Bedford Cut Stone v. The Stone Cutters Assoc., 274 U. S. 37;
Loewe v. Lawlor, 208 U. S. 274.

When necessary, this Court will enjoin purely local acts in order thereby to protect Interstate Commerce from unlawful restraints. (See cases in paragraph above cited.)

A scheme arranged to deprive local business men of bottled milk for re-sale by prohibiting dairy owners who obtain such milk from producers within a radius extending beyond the boundaries of the State, which includes restraining, hindering or preventing such supply from reaching them from sources outside the State, is, we submit, a burden on Interstate Commerce which we have heretofore shown may be enjoined.

CONCLUSION.

For the reason stated and on the authority of the cases cited, it is respectfully submitted that this petition should be granted.

CHARLES AUERBACH,
RAY T. MILLER,
Counsel for Petitioners.

CHARLES AUERBACH,
Of Counsel.

APPENDIX.

Sections of Ohio General Code.

SECTION 6390. *Definition of terms.* The word "person" or "persons" as used in this chapter includes corporations, partnerships and associations existing under or authorized by any state or territory of the United States, or a foreign country. (93 v. 146, § 12.)

SECTION 6391. *Definition of trusts.* A trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, for any or all of the following purposes:

1. To create or carry out restrictions in trade or commerce.
2. To limit or reduce the production or increase, or reduce the price of merchandise or a commodity.
3. To prevent competition in manufacturing, making, transportation, sale or purchase or merchandise, produce or a commodity.
4. To fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise, produce or commerce, intended for sale, barter, use or consumption in this state.
5. To make, enter into, execute or carry out contracts, obligations or agreements of any kind or description, by which they bind or have bound themselves not to sell, dispose of or transport an article or commodity, or an article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers or consumers in the sale or transportation of such article or commodity, or by which they agree to pool, combine or directly or indirectly unite any in-

terests which they have connected with the sale or transportation of such article or commodity, that its price might in any manner be affected. Such trust as is defined herein is unlawful, against public policy and void. (93 v. 143, § 1.)

SECTION 6393. *Illegal Contract.* A contract or agreement in violation of any provision of this chapter is void and not enforceable either in law or equity. (93 v. 145, § 8.)

SECTION 6397. *Liability for Damages.* In addition to the civil and criminal penalties provided in this chapter, the person injured in his business or property by another person, or by a corporation, association or partnership, by reason of anything forbidden or declared to be unlawful in this chapter, may sue therefor in any court having jurisdiction thereof in the county where the defendant or his agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and recover two-fold the damages sustained by him and his costs of suit. When it appears to the court, before which a proceeding under this chapter is pending, that the ends of justice require other parties to be brought before such court, the court may cause them to be made parties defendant and summoned whether they reside in the county where such action is pending, or not. (93 v. 146, § 11.)

SECTION 6399. *Evidence.* In prosecutions under this chapter, it shall be sufficient to prove that a trust or combination as defined herein, exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing an article of agreement, or a written instrument on which it may have been based; or that it was evidenced by a written instrument. The character of the trust or combination alleged may be established by proof of its general reputation as such. (93 v. 145, § 6.)

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

RAY RITTER, *et al.*,
Petitioners,

vs.

MILK AND ICE CREAM DRIVER AND DAIRY EMPLOYEES UNION, Local 336, *et al.*,
Respondents.

MOTION TO DISPENSE WITH PRINTING AND SERVICE OF PORTIONS OF RECORD.

Counsel for petitioners file herewith their petition for a writ of certiorari to the Supreme Court of Ohio, accompanied by a Narrative Statement of the evidence approved by the Supreme Court of Ohio, the original certified record of the proceedings in the case in the Supreme Court of Ohio, together with a certified copy of the Orders, Journal Entries and Rulings in said court and in the Court of Appeals and Common Pleas Court of Cuyahoga County, Ohio, and all lodged with the clerk of this Court by the Supreme Court of Ohio.

1. The nature of this case and the questions presented by the petition for a writ of certiorari have been set forth in the foregoing petition.
2. The petitioners now seek to be relieved of printing that part of the record which is not necessary to a consideration of the Questions presented by the petition for a writ of certiorari filed herewith.

The record of the evidence including exhibits and opinion of the Court of Appeals consists of approximately 3500

pages. One exhibit numbering 5A to 5U, which contains the discussions of the negotiators from Sept. 8th to Oct. 21st, 1937, contains 2283 pages. The record proper exclusive of this exhibit contains portions of these conversations as relating to the matters involved in the petition for the writ of injunction in the courts below and in the petition for a writ of certiorari in this Court. In the same record is contained the full verbatim direct testimony offered by William Corrigan by way of defense. Mr. Corrigan was Counsel for the Union and participated during their negotiations from Oct. 5th to Oct. 21st, 1937. The defense relied almost entirely upon his testimony. In their briefs in the Court of Appeals and in the Supreme Court of Ohio the Union and Telling Belle Vernon Company did not cite, quote or rely upon any of the conversations referred to in Ex. 5A to 5U, quoting almost entirely from the testimony of Mr. Corrigan and of Mr. Jones. The testimony of Messrs. Sechler, Diltz and Jones, who were likewise negotiators, appears in the record proper and in narrative form in the Narrative Statement of the evidence approved by the Supreme Court of Ohio. The cost of printing the entire record with all the exhibits including Ex. 5A to 5U will, it is estimated, be approximately $7,000 and perhaps more.

3. The petitioners on July 30th served the Union and Telling Belle Vernon Company, the only respondents who filed briefs in the Supreme Court of Ohio and argued orally, and to Dairymens Ohio Farmers, who adopted the briefs of Telling Belle Vernon in the Supreme Court and did not argue orally, a proposed stipulation that the record to be printed in this court consist of the following: (1) The names of the three respondents above named; (2) Articles 1, 20, 21, 23, 25, 34, 36 of Defendants' Exhibit 2; (3) Notice of Fairmont Creamery to brokers; (4) Article 31 of Defendants' Ex. A; (5) That only such parts of the Bill of Exceptions as shall be essential to a consideration of the Questions presented by the petition for a writ of certiorari which

shall be based on assignments #7, 9, 12, 13, 19, 20, 21 in the Supreme Court of Ohio, be printed and that these parts be reduced in narrative form; (6) a transcript of the Docket and Journal Entries in all the courts below and the opinions of the Court of Appeals and Common Pleas Court.

4. On August 1, 1940 the Statement containing verbatim the direct testimony of Mr. Corrigan and that of Mr. Smith reading from the transcribed notes the conversations of the negotiators appearing in the record proper, together with a Narrative Statement of the testimony of the other witnesses, was submitted to the respondents for stipulation. On the date of submission of the request, to wit: July 30th, Counsel for Telling Belle Vernon immediately stated he would not stipulate unless the entire Ex. 5A to 5U were included. Counsel for the Union indicated he would not agree until Counsel for Telling Belle Vernon agreed. This refusal was reiterated after August 1, 1940.

5. On August 7, 1940 Plaintiffs' Counsel attempted to reach an agreement with Counsel for Tellings to dispense with the printing of unnecessary material, but to no avail. Opposing counsel insisted that if the testimony of Smith were to appear in the Narrative Statement, the entire Ex. 5a to 5U, consisting of 2283 pages, be printed in full, even though the same counsel objected to the introduction of this exhibit when it was offered by other defendants in R. 728; N. S. 86; N. S. 129.

6. Ex. 5A to 5U contains many items which the Union and Employers Committee discussed from September 8th through October 21st, 1937 in addition to the discussions relating to brokers. Messrs. Sechler, Diltz, Jones, state so repeatedly, and it appears in the Narrative Statement approved by the court below. The petitioners do not deny it. Such matters as opening and closing hours, lights, time-clocks, etc., were all discussed. These have absolutely no bearing on the issues raised in the petition for a writ of certiorari. Yet the respondent Telling

Belle Vernon insists that these be printed *in toto* if Smith's testimony is to be printed. The Union refuses to stipulate unless and until Telling Belle Vernon does. The printing of so voluminous an exhibit would under the circumstances be unreasonable and we believe would be in violation of Rule 38, Section 8, providing for the printing of a reasonable record.

7. On August 14, 1940 the petitioners presented to counsel for the defendants a copy of the petition herein filed, based upon the narrative statement heretofore presented to them for stipulation on August 1, 1940, together with verbatim copies of plaintiffs-appellants' Exhibits 1, 3, 4 and defendants' Exhibit A, and requested their stipulation to the narrative statement thus supplemented and amended, advising them that if they failed to stipulate, the narrative statement would be presented to the Supreme Court of Ohio for its approval on August 16, 1940. Exhibit 3 and Exhibit 2 are identical in terms except for name of employer.

   The defendants refused to stipulate, and on August 16, 1940 counsel for The Telling Belle Vernon Company appeared in the Supreme Court of Ohio and argued against the approval of the narrative statement. On August 17, 1940, Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio, approved the narrative statement for the court.

The petitioners are marginal people and are financially unable to expend approximately $7,000 for the printing of the entire record including this exhibit. If they are compelled to print the same, they would be deprived of the means of presenting their petition to this Court, although they earnestly believe their constitutional rights were violated. In lieu thereof the petitioners have lodged the entire original record certified as being the record of the testimony in the Supreme Court of Ohio, together with a certified copy of the Docket and Journal Entries and Rul-

ings in all courts below, and are filing herewith a Narrative Statement approved by the Supreme Court of Ohio after a full hearing of this issue before the Chief Justice of the Supreme Court of Ohio, at Columbus, Ohio, on August 16, 1940.

WHEREFORE, It is prayed: (a) That the Court rule that the accompanying petition for a writ is properly filed upon the record consisting of the original certified record of the testimony before the Supreme Court of Ohio; (b) That it consider the case upon the required number of printed copies of the Narrative Statement and the exhibits approved by the Supreme Court of Ohio and filed in this Court; (c) That it rule that service which petitioners are now making upon respondents of copies of this motion, the Petition for a Writ of Certiorari and the approved Narrative Statement, constitutes sufficient compliance with the rules of this Court.

Respectfully submitted,

CHARLES AUERBACH,
RAY T. MILLER,
Counsel for Petitioners.

CHARLES AUERBACH,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 354.

RAY RITTER, *et al.*,
Petitioners,

vs.

MILK AND ICE CREAM DRIVERS AND
DAIRY EMPLOYEES UNION,
Local 336, *et al.*,
Respondents.

REPLY BRIEF OF PETITIONERS.

CHARLES AUERBACH,
Leader Building,
Cleveland, Ohio,
RAY T. MILLER,
Standard Building,
Cleveland, Ohio,
Counsel for Petitioners.

CHARLES AUERBACH,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

INDEX.

Authorities Cited.

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 354.

RAY RITTER, *et al.*,
Petitioners,

vs.

MILK AND ICE CREAM DRIVERS AND DAIRY EMPLOYEES UNION, Local 336, *et al.*,
Respondents.

REPLY BRIEF OF PETITIONERS.

I.

THE SCHEME OF THE RESPONDENTS INVOLVED BOTH AN ILLEGAL PURPOSE AND AN ILLEGAL EFFECT.

Respondents contend that their ultimate object having been for the betterment of the members of the Union, their action was lawful. Such purposes do not make an unlawful combination or conspiracy lawful, or an illegal means legal.

Bedford Cut Stone Co. vs. Stone Cutters Assoc., 274 U. S. 37;
Duplex Printing Press Co. vs. Deering, 254 U. S. 443;
Loewe vs. Lawler, 208 U. S. 274.

Their argument that the agreement was designed to help the members of the defendants' Union and not hurt the petitioners' business is specious in the light of the established facts. The elimination of the brokers and the destruction of their business was one of the prime objects of this group. The statements of Rohrich, Hynes, Margo, Union representatives and those of Manfredi and Baxter, dairymen, referred to in the Petition for Writ of Certiorari,

pages 6 to 9, and in the Narrative Statement (N. S. 16, 17), indicate clearly a studied effort and purpose of both the Union and the dairies to destroy these independent business men, eliminate this "evil" and thereby benefit themselves. The annihilation and destruction of the Petitioners' business was the *sine qua non* of the whole scheme, and referring to them derisively as "peddlers" in their briefs does not enhance the defendants' position or minimize that of the petitioners.

Neither Tellings nor the Union deny the effect of this agreement, but both attempt to justify it. In doing so they rely upon *Senn v. Tile Layers Union,* 301 U. S. 468, and on *National Fireproofing Co. v. Mason Builders Association,* 169 Fed. 259. In the *Senn* case the question involved was whether the Wisconsin "picketing" statute as construed and applied by the courts of the State of Wisconsin violated the 14th Amendment to the United States Constitution. It was upon this ground that the Supreme Court took jurisdiction, and supports our position that there exists a substantial Federal constitutional question in the case at bar.

In discussing the substantive questions involved, the Court pointed with approval to the provisions of the Wisconsin statute differentiating legal from illegal labor union activities, specifically proscribing secondary boycotts, as follows:

> "The statute provides that the picketing must be peaceful and that the term as used implies not only absence of violence but absence of any unlawful act; it precludes the intimidation of customers; it precludes any form of physical obstruction or interference with Plaintiffs' business; it authorizes giving publicity to the existence of the dispute, 'whether by advertising, patroling any public streets or places where any person or persons may lawfully be; but precludes misrepresentation of the facts of the controversy, *and it declares that, "nothing herein shall be construed to legalize a secondary boycott."* See *Duplex Printing*

Press Co. v. Deering, 254 U. S. 443, 466, 65 L. ed. 349, 356, 41 Supreme Court 172, 16 A. L. R. 196. Inherently the means authorized are clearly unobjectionable.' ''

Since the question of picketing is not involved in the case at bar but boycotting is, and since this Court has referred to *Duplex Printing Press v. Deering* with evident reaffirmation, we submit that the *Senn* case supports the contention of the petitioners rather than giving solace to the respondents.

The *National Fireproofing* case, *supra*, a Federal Circuit Court decision decided in 1909 enunciates a principle which was repudiated by this Court in 1921 in *Duplex Printing Press Co. v. Deering.*

In the *Duplex* case, a secondary boycott has been defined as:

> ''A combination not merely to refrain from dealing with complainant or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott') but to exercise coercive pressure upon such customers, actual and prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it.''

If it be true, as Tellings and the Union contend, that the milk distributors had to accept the demands of the Union not to sell to the brokers upon the threat of strike, which they feared would cause them loss or damage, then clearly coercive pressure was exercised upon these dealers not to deal with brokers, actual or prospective, thereby meeting squarely this Court's definition and disapproval of a secondary boycott.

In *Gompers v. Buck's Stove and Range Co.*, 221 U. S. 418, 439, this Court enunciated the doctrine applicable here in words as follows:

> ''But the very fact that it is lawful to form these bodies (labor unions), with multitudes of members means that they have thereby acquired vast power in

> the presence of which the individual may be helpless. This power when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifices of rights protected by the Constitution, or by standing on such rights and appealing to the preventful powers of a court of equity. When such appeal is made, it is the duty of government to protect the one against the many, as well as the many against the one."

Had there been a sincere desire not to engage in a scheme involving a boycott of small competitors, Tellings and the other dealers could have found in the above pronouncement by the Supreme Court legal as well as moral justification for their refusal to become participants in such a venture. Public opinion, as well as the courts, would not have tolerated a labor union's demands predicated upon the destruction of a group of individual business men who earn their livelihood through their own labors. But the will was not there. One of the dealers, Manfredi, told why. It was he who asserted that the broker must buy bottled milk, and if he were eliminated by this agreement, the price of milk would be "stabilized" and competition eliminated. (N. S. 18.) It was he who said that if this provision were not in the agreement he would not have entered into it. (N. S. 17.) Manfredi had the forthrightness to tell the Court what he thought.

It is significant that membership in the Union was closed to the brokers; their obtaining a supply elsewhere was made impossible and the opening of a cooperative dairy, it was agreed, would not be tolerated. By Article I, Paragraph 3 of Exhibit 3, even those brokers from whom the Union at the time of the negotiations was accepting dues, constituted a conflict in membership and provided that "proper action will be taken by the Union to correct such conflict in membership." Not only was the Union thereby closed to brokers who might seek its membership, but such as were already members would be eliminated. (Such was and is today the purpose of this group.)

If the dealers were coerced into this scheme, such action constituted a secondary boycott and was therefore in violation of the state anti-trust law. If, on the other hand, they were not coerced, then they entered into an unlawful conspiracy to accomplish the same purpose in violation of the anti-trust laws and the petitioners should have been given the benefit of the act by the court below. In either event, failure by the court to do so deprived them of property and denied them rights guaranteed by the 14th Amendment to the United States Constitution as regards equal protection and due process.

II.

SINCE THE ACTION OF THE RESPONDENTS CAN AND IN ALL PROBABILITY WILL BE REPEATED, THE QUESTION IS NOT MOOT.

Where it lies within the power of the defendants to repeat the acts complained of, the question is not moot.

Southern Pacific Terminal Co. v. Interstate Commerce Com., 219 U. S. 498;

Federal Trades Commission v. Goodyear Tire & Rubber, 304 U. S. 357;

Miller v. Lutheran Conference & Camp Assoc., 200 Atl. 646, 649, 331 Pa. 241.

In view of the fact that counsel for Tellings has made the claim that on the day preceding the filing of its brief the Union gave it and all other milk dealers notice of the expiration of the agreement, and has thus brought into this case matters extraneous to the Record, we regretfully find it necessary by way of defense to call the Court's attention to matters bearing upon this issue, so that it may be fully advised in the premises.

In September, 1939, when this cause was before the Court of Appeals for Cuyahoga County, the same claim was made; in fact the Union named fifty to sixty dairy owners whose contracts it was claimed had expired at the date of

hearing in October, 1939. The contract is self-perpetuating but can be made inoperative by either party giving thirty days notice prior to its expiration on September 30 of each year. The petitioners then claimed that irrespective of these fifty or sixty named dairies the contract at least insofar as it concerned brokers was nevertheless in force. Upon the denial of the bill for an injunction by the Court of Appeals, the following letter was mailed to dealers among whom were those with whom it was claimed the Union had no agreement:

"Milk and Ice Cream Drivers and Dairy
Employees Union Local No. 336
of the I. B. of T. C. S. and H. of A.
Affiliated with
American Federation of Labor, Ohio State Federation
of Labor and Cleveland Federation of Labor
1030 Sumner Avenue Cleveland, Ohio
Jan. 23, 1940

Dear Sir:

We wish to call your attention to Article XXXIV of the contract, which is as follows:

'The Employer further agrees that beginning May 1st, 1938, the distribution and sale of dairy products shall be carried on exclusively by members of said Local No. 336. This does not include emergency deliveries or sales through retail outlets owned by the Employer or the employment directly by the dairy of solicitors, salesmen and collectors who do not have delivery duties.'

Enforcement of this section of the contract was prevented due to the fact that a number of brokers commenced a lawsuit in the Common Pleas Court, and were granted a temporary injunction restraining the Union and the employers from complying with the terms of the above mentioned Section XXXIV.

The Court of Common Pleas held against the brokers who then appealed to the Court of Appeals of Cuyahoga County. On the twenty-third day of December, 1939, the Court of Appeals handed down a final decision refusing to interfere with the enforcement of this section of the contract.

The Union will now insist upon the compliance with this term of this section of the contract by March 1, 1940.

Very truly yours,

MILK AND ICE CREAM DRIVERS AND DAIRY EMPLOYEES UNION, LOCAL NO. 336,

LEO W. MARGO,

Secretary."

If any evidence were needed as to the future intentions of these respondents, this amply supplies the proof. We are thus brought within the holdings that where the controversy may again arise, the question is not moot and the Court may give redress. As said in *Miller v. Lutheran Conference and Camp Association, supra,* Syl. 2—

> "An appeal from a decree enjoining trespasses of property was not dismissible on the ground that appellant had discontinued trespasses which were the subject of the bill where the controversy might flare up again if appellant obtained another license for boating, bathing and fishing purposes which constituted the trespass."

III.

FACTUALLY AND UPON PRINCIPLE THE COMBINATION IS NOT JUSTIFIABLE.

Throughout the factual statement of the case as set forth in the Brief of the Telling Belle Vernon Company, an attempt is made to justify the combination of the Union and Employers to deprive three hundred small business men of their means of earning a livelihood. The argument propounded is as follows:

> The Union wanted impossible terms, namely, the payment of a flat weekly wage. The employers refused to pay it. Therefore, the matter was settled by destroying the business of third persons, non-employees, by shutting off their supply of bottled milk.

The fact that Rohrich, the Union spokesman, stated he was interested in more than wages for his men, namely having "prices leveled" (R. 756—N. S. 107, 108); that the Union was willing to accept responsibility for such action (R. 754—N. S. 105, 106); that Sechler, another Union representative, stated "the Union was trying to make conditions better for (the dealers) by compelling (their) competitors to do the same" (N. S. 102; R. 754) is glossed over as though it were dehors the Record. The fact that the Union boasted of its efficiency in bringing small storekeepers to time as regards the sales price of milk through picketing in cooperation with the Fraternal League of Milk Dealers and wanted something in return for such service, is totally ignored in the attempt to justify this combination.

From the argument in Telling's brief on page 16, one would be led to believe that the age of enlightenment was indeed at hand, for here the largest milk distributor in Cleveland, a part of a huge chain stretching from coast to coast, is heard to advocate labor's right to freedom of contract with respect to the sale of its services as being equal to the owner's right to dispose of property. Strange circumstances sometimes evoke humorous incongruities in advocacy. This is an example of it. Surely such statement must have been made by this corporation with its figurative tongue in its cheek. The Telling Belle Vernon Company is the corporation which in 1922 engaged in what Mr. Corrigan in his brief on behalf of the Union says was a "disastrous strike" resulting in wiping the milk drivers union "out of existence." (p. 2, Brief of Union.) This is the same company which in 1936 engaged in a scheme of price fixing and monopoly practices, which were condemned and enjoined by the Nisi Prius Court in Cuyahoga County in *Clover Meadow Creamery Co. v. National Dairies, et al.*, 29 O. N. P. N. S. 243. This is the company which refused to meet the demands of the Union for a reasonable flat weekly wage in 1937, which, if granted, would have avoided the threatened strike, upon which it relies so heavily as a

defense, and would have precluded the present charges of monopoly and price fixing which are leveled against it. This corporation is now heard to champion the cause of labor.

But by the payment of a weekly wage the scheme to monopolize and fix the price of milk in Cleveland could not have been made effective. Such method of paying wages would have deprived the defendant company and others in the same position of Clause 25 of the agreement which fixed the retail price of milk at 12¢ per quart and the wholesale price at 10¢ per quart. This, Mr. Jones, the sales manager of Tellings, reluctantly admitted would put the dealer who paid commission to the driver on the basis of 12¢ per quart while charging 11¢ at a disadvantage. No strenuous argument is needed to indicate what a deterrent this would be to underselling. In the light of the past history of this company and other defendant dealers as set forth in the *Clover Meadow* case, *supra,* and in the light of statements made by Messrs. Rohrich, Hynes, Baxter, Manfredi and others found in the Narrative Statement and referred to in our petition (pages 6 to 9 and N. S. 16, 17) we submit that Tellings takes this position because there is no other way of escape.

"By their fruits ye shall know them."

The Union claims a superior right to the independent entrepreneur. Its argument is that since the demand for a closed shop is legally permissible it has a right to strike for it and to destroy the business of independent business men, non-employees, who earn their livelihood through their own labors. This Court we submit has held the contrary in *Duplex Printing Press v. Deering; Bedford Cut Stone v. Stone Cutters Association,* 274 U. S. 37; and *U. S. v. Brims.* On principle, by what process of reasoning can the Union claim its rights to be superior to those of the broker? The truck which the broker owns, the good will he creates are as much his stock in trade as are the services of the em-

ployee for which Tellings as well as the Union now plead. Surely, a doctrine which would permit the existence of one group of workingmen upon the correlative destruction of another and similar group would be as dangerous as it would be inherently unjust. No one can deny the Union's right to demand and obtain a living wage for its members. This is provided for in the contract as is also the "closed shop." (Paragraph 1, Article 1, Ex. 3.) The effort to go beyond that, to make it impossible for non employees to obtain a supply of milk and thereby drive them out of business shifts the real conflict between the advertising dairy and the broker, to a pretended conflict between the broker and the Union driver, and makes such effort unjustifiable and illegal.

The defense is made that since each dealer had the privilege of refusing to deal with the petitioners the group could do likewise. This Court held the contrary in *Granada Lumber Co. v. Mississippi,* 217 U. S. 433, where it said:

> "An act harmless when done by one may become a public wrong when done by many acting in concert."

To the same effect *Restatement of the Law of Torts,* Sec. 765 Rationale.

IV.

THE FEDERAL QUESTION WAS PROPERLY AND TIMELY RAISED IN THE STATE COURTS.

On page 10 of our Petition we set forth that the Federal question was raised in the Court of Appeals and thereafter in the Supreme Court of Ohio by Assignments of Error. The question was argued in the Briefs and orally. The Supreme Court of Ohio considered the questions thus raised and rendered an adverse ruling on the ground that no debatable Federal constitutional question was involved. (*Ritter v. Union,* 136 O. S. 582.) Since then the Supreme Court of Ohio in certifying its approval of the Narrative Statement has indicated that it considered the entire testimony

in dismissing the plaintiff's appeal as of right, upon the ground that there was no debatable Federal constitutional question involved. This Court has repeatedly held this to be sufficient:

Van Huefel v. Harkelrode, 284 U. S. 225;
Titus v. Walleck, 306 U. S. 282;
Mathew v. Huwe, 269 U. S. 262.

In *City National Bank v. Durr,* 257 U. S. 99, where the petitioner raised the Federal question in the Ohio Supreme Court for the first time upon an application for a rehearing which was denied without opinion, this Court took jurisdiction by granting certiorari.

> "Whether a Federal question was adequately presented and decided in a State Court is itself a Federal question."

Lavelle v. Griffin, 303 U. S. 444;
Carter v. Texas, 177 U. S. 442, 447;
Ward v. Love, 253 U. S. 17, 23.

We respectfully submit that the matters in this cause are of great public interest and importance, that there is a substantial Federal constitutional question involved and pray that our petition be granted.

Respectfully submitted,

CHARLES AUERBACH,
RAY T. MILLER,
Counsel for Petitioners.

CHARLES AUERBACH,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 354.

RAY RITTER, *et al.*,

Petitioners,

vs.

MILK AND ICE CREAM DRIVERS AND DAIRY EMPLOYEES UNION, Local 336, *et al.*,

Respondents.

BRIEF OF RESPONDENT, THE TELLING-BELLE VERNON COMPANY, OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

RAYMOND T. JACKSON,
CLAYTON A. QUINTRELL,
Union Commerce Bldg.,
Cleveland, Ohio,
Counsel for Respondent, The Telling Belle-Vernon Company.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

INDEX.

AUTHORITIES CITED OR DISTINGUISHED.

Cases.

Text.

Constitution.

Statute.

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 354.

RAY RITTER, *et al.*,
Petitioners,

vs.

MILK AND ICE CREAM DRIVERS AND DAIRY EMPLOYEES UNION, Local 336, *et al.*,
Respondents.

BRIEF OF RESPONDENT, THE TELLING-BELLE VERNON COMPANY, OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

This brief is filed by a respondent, The Telling-Belle Vernon Company, in opposition to the petition for a writ of certiorari to be directed to the Supreme Court of Ohio. For convenience, the petitioners, since they were plaintiffs or appellants in each of the three courts of Ohio, will be designated herein as the "plaintiffs," and the parties opposing this petition will be referred to herein as "defendants."

PROCEDURAL HISTORY OF THE CASE.

Plaintiffs filed their suit in equity in the Court of Common Pleas of Cuyahoga County, Ohio—a court of original and general equitable jurisdiction—seeking to enjoin the performance by the defendants of certain provisions of contracts of employment existing between the defendant dairies and the members of the defendant union of milk

wagon drivers. Plaintiffs' suit was based entirely upon their contention that these contracts precluded the defendant dairies from supplying the plaintiffs with milk and had been entered into pursuant to a combination of the defendant dairies and the Union alleged to be in violation of the Ohio Anti-Trust Act and of principles of common law since, it was charged, such combination was entered into for the primary or sole purpose of driving the plaintiffs from business, of fixing the retail price of milk in Cleveland and of creating a monopoly in the marketing of milk in the Cleveland area. The fifty odd dairies and the Union filed answers to this petition which, for the most part, constituted general denials. At the conclusion of the plaintiffs' case, after about a week of trial, the Court of Common Pleas granted the defendants' motion to dismiss the plaintiffs' petition on the ground that the plaintiffs had failed to prove their cause of action.

Thereafter, the plaintiffs appealed to the Court of Appeals of said County where they were entitled, under the Ohio statutory procedure, to a trial *de novo*. The plaintiffs there introduced before a Master appointed by the Court of Appeals not only the evidence offered by them in the lower court, but also a large amount of additional testimony including a stenographic transcript of everything spoken by the defendants in the negotiation of this employment contract. After consideration of this evidence, as well as that offered by the defendants, the Court of Appeals found as a fact that the plaintiffs had again failed to prove the existence of any conspiracy, unlawful under the provisions of the Ohio Anti-Trust Act or common law principles, but that, instead, the greater weight of the evidence demonstrated that the defendants had acted for the accomplishment of a lawful object through the use of legal means. The Court of Appeals, consequently, denied the prayer of the plaintiffs' petition and ordered its dismissal. Shortly thereafter, the Court denied the plaintiffs' motion

for a new trial or rehearing. The opinion of the Court of Appeals has not been officially reported but is copied in full in Appendix A of this brief.

The plaintiffs then filed an appeal in the Supreme Court of Ohio, as of right, on the ground that a question arising under the Constitution of the United States and under the Constitution of the State of Ohio was involved. They also filed a motion in the Supreme Court of Ohio requesting that Court to order the Court of Appeals to certify its record to the Supreme Court of Ohio on the ground that the case was one of great and general public interest. The defendants opposed this motion and moved that the appeal filed as of right be dismissed on the ground that no question arising either under the Constitution of the United States or under the State of Ohio was involved. After an examination of the entire record, the Supreme Court refused to grant the motion to certify the record and granted the defendants' motion to dismiss the appeal filed as of right, the Supreme Court holding that no debatable constitutional question was involved in the case. The Supreme Court of Ohio rendered no opinion but its finding and order are reported in 136 O. S. 582.

The plaintiffs now contend that this Court should order the Supreme Court of Ohio to certify its record to this Court under Title 28 U. S. C., Section 344-(b) of the Judicial Code.

PRESENTATION OF FEDERAL QUESTION.

The Record demonstrates that no mention of the Constitution of the United States, of any federal statute or of any right arising under either was made, at least until after the decision in the Court of Appeals. Plaintiffs in their motion for a new trial in the Court of Appeals complained that that court had erred in failing to find that:

> "The right to conduct a lawful business free from malicious molestation and interference * * * is a basic property right guaranteed and protected by the Constitutions of the State of Ohio and of the United States,

> and that it is unlawful * * * to interfere with that right, there being no legitimate trade dispute between the plaintiff and any of the defendants."

and also complained that,

> "The defendants' acts * * * constituted a conspiracy * * * to drive the plaintiff-appellants out of business and thus destroy a valuable property right, contrary to the Constitutions of the State of Ohio and the United States."

These vague references to the Constitution are clearly inadequate to raise properly the requisite federal question.

> *Michigan Sugar Co. v. Michigan,* 185 U. S. 112;
> *Herndon v. Georgia,* 295 U. S. 441, 442 and 443;
> *Clarke v. McDade,* 165 U. S. 168;
> *Capital City Dairy Co. v. Ohio,* 183 U. S. 238;
> *Harding v. Illinois,* 196 U. S. 78.

The plaintiffs, in their assignments of error to the Supreme Court of Ohio especially assignments numbers 7, 19, 20 and 21, for the first time made reference to a specific section of the Constitution of the United States, stating that the judgment of the Court of Appeals was "in violation of Article XIV, Section 1, Article I, Section 8 thereof."

These assignments related to the appeal filed as of right in the Supreme Court of Ohio on the ground that a question was involved in the case relating to either the state or federal Constitution. No opinion was rendered by the Supreme Court of Ohio. As indicated from the record in the cases of *Simms v. Elyria Savings & Trust Co.,* 296 U. S. 596; *Simms v. Savings Deposit & Trust Co.,* 296 U. S. 597; *Dennis v. New York Central R. Co.,* 296 U. S. 621, and as is suggested in Robertson and Kirkham *"Jurisdiction of the Supreme Court of the United States,"* Section 78, footnote 15:

> "Jurisdiction was wanting under the rule which requires, in the absence of an express decision of the federal question by the State Court, an affirmative

showing that the federal question did not fail of decision for want of proper presentation."

This is particularly true under Ohio procedure, since it is the well established law in that State that the Supreme Court will only consider questions specifically raised and determined in the court of first instance.

Stephenson v. Ohio, 119 O. S. 349.

In *Thatcher v. The Pennsylvania, Ohio and Detroit Rd. Co.,* 121 O. S. 205 (1929) the Court said:

> "Where an error proceeding is filed in this court as of right, under a claim that it involves questions arising under the Constitution of the State of Ohio or the Constitution of the United States, and no motion is filed to certify the record, the Court will not hear and determine the same, unless it is shown that the constitutional questions were presented to and determined by the court of first instance."

Because of this rule in Ohio, it is submitted that this Court should not review Federal questions which were not raised in the trial court and upon which the Supreme Court of Ohio has made no express ruling.

Mutual Life Insurance v. McGrew, 188 U. S. 291.

THE CASE HAS BECOME MOOT.

The employment contract complained of was entered into in the latter part of 1937. Article XXXVI thereof (Plaintiffs-Appellants' Ex. 2) provides:

> "This Agreement shall go into effect as of October 1, 1937 and continue in full force and effect until September 30, 1938 and continue thereafter for yearly periods, unless written notice of a contrary intention is given by either party thirty (30) days prior to September 30th in any year thereafter."

This defendant has recently received such notice from the Union that the contract is to terminate on September 30, 1940. The Union has today advised us that it has given

like notice to each other defendant dairy with whom it has such contract and will apply to this Court to supplement the Record by the establishment of such fact. Consequently all of the employment contracts complained of will have terminated prior to the hearing of the plaintiffs' petition. The plaintiffs have secured, without opposition from any of the defendants, temporary injunctions or restraining orders in each of the three state courts, the order issued by the Supreme Court of Ohio being still in effect, restraining the defendants from enforcing or performing the terms of the contract alleged to prohibit sales to the plaintiffs. Consequently no damage has been suffered by the plaintiffs, and in this suit they seek only an injunction against the performance of such provisions of these contracts. No injunction should, or can, be granted to restrain the performance of a contract which has by its very terms expired.

FACTUAL STATEMENT OF THE CASE.

Parties—The plaintiffs are about forty (40) individuals inaccurately but commonly referred to in the Record as "brokers." Actually they fall in the category of an itinerant retailer or peddler rather than a broker. These brokers own, or rent, and operate their milk wagons, purchasing pasteurized and bottled milk from dairies situated within Cuyahoga County, Ohio, and reselling it at a profit. (R. 87-91, 124-5, 488-91, 549, 550.)

The defendants, other than the Union and its officers, are established dairies owning and operating plants in Cuyahoga County, Ohio, purchasing their milk from the rural sections of said county and of adjacent counties in Ohio. There were about one hundred forty (140) of such dairies which pasteurized and bottled the milk so purchased by them, and usually delivered the bottled milk with their own delivery equipment operated by employee-drivers. The defendant Union was composed of several thousand drivers of milk wagons, each such driver working

as an employee of a particular dairy, selling his employer's bottled milk on a specified route, at a price and upon terms fixed by his employer and under a method of pay where at least sixty per cent (60%) of his compensation was derived from commissions based upon the amount of milk sold and delivered by him on his route or in his specified territory. (R. 320, 339-40, 361, 536.)

Milk is probably one of the most important and vital foods of the modern community. While it is one of the most necessary and wholesome of foods, the slightest and even an imperceptible contamination will render it a source of grave danger to the public health. -Consequently, governmental authorities have placed many restrictions upon the processing, sale and delivery of milk to the public.

Under these health regulations, milk which was sold by the dairy, either through the broker or through the employee of the dairy was identical, it was in the same bottle and bore the same bottle-cap. The broker's wagon was also required to bear the name of the dairy from which the broker purchased the milk and his wagon frequently, if not usually, bore the color scheme or insignia of the dairy. Also the broker frequently wore the uniform or cap of the employee-driver of that dairy. As a result it was practically impossible for the housewife to ascertain whether she was purchasing the milk of a particular dairy from a broker or from an employee-driver of that dairy. (R. 88-91, 124-5, 488-91, 612-13, 791-2, 831, 853-4.)

Under these circumstances, every incentive was afforded to the brokers to invade the route of the union-driver employed by the dairy from which the broker purchased milk, to take away such driver's customers by open competition, including a reduction in price from that which the driver was permitted by his employer to charge. Since at least sixty per cent (60%) of the driver's compensation was derived from commissions based upon his sales and collections, these actions of the broker destroyed or greatly de-

creased the driver's income and, in some instances, so crippled the driver's trade that he was discharged by his employer. (Plaintiffs-Appellants' Exhibit 4, R. 943-6, 377-9, 361.)

The union driver resented this, believing that while he expected to compete with drivers for other dairies, he alone was supposed to, and should, have the exclusive right to sell his employer's milk in his territory or upon his route. He resented the damage done to him by the broker, and believed that his employer was wholly unfair to him in supplying the brokers with a commodity indistinguishable from that which the driver sold, when such employer had every reason to know that, as a result of the employer's sales to brokers, the driver's commissions would be seriously curtailed. (R. 377, 943-5.)

This resentment became so intense that in July 1937, the Union served written notices upon all dairies employing its drivers that a different type of employment must be arranged. (R. 318.) The Union presented a written employment contract whereby the driver's pay would be placed almost entirely upon the basis of a fixed salary. (R. 558-9, 360-1, Defendants' Exhibit A.) The dairies refused, insisting upon the commission basis; consequently, a method of collective bargaining was put into effect, which has been in vogue in the milk industry in Cuyahoga County since the enactment of the National Industrial Recovery Act of 1933. This method of bargaining has been used because of the fact that the dairies as well as the Union appreciated the impossibility of the Union negotiating annually employment contracts with one hundred forty (140) or more dairies in this area, which, if separately negotiated, would have led to a great disparity in the income of the various drivers, in wage costs, hours of work and other elements of the dairies' cost of production and delivery. Pursuant to this method, various dairies appointed a negotiating committee and the Union appointed a like commit-

tee. These committees were not empowered to incur any obligation in behalf of any dairy nor on behalf of the Union, but were, instead, to attempt to adjust the controversy and to formulate a standardized and mutually acceptable contract of employment which, if adopted by a vote of the members of the Union, would be submitted by the Union to each dairy for its independent acceptance or rejection. (R. 927-30, 517-20.)

These committees having been appointed in the early fall of 1937, negotiations were begun and continued until about October 11th, 1937. (R. 930-3, 365-72, 385-7.) The parties were deadlocked on numerous issues including the question as to whether the driver's compensation should be by way of a fixed salary or should be upon a commission basis. (R. 367-9, 938.) The Union called a strike to be effective October 11th. (R. 366, 930-1.) Due to the public alarm at the consequences of such a strike, and to the intercession of Mr. Corrigan, counsel for the Union, the strike was held in abeyance and negotiations resumed. (R. 931-5.) After an inspection of the costs of production of several dairies (R. 936-7), the Union finally acceded to the commission basis of pay, but only upon the condition that the employer-dairy would refrain from selling to brokers, so that the union driver would be assured that he alone could sell his employer's milk upon his route. (R. 943-5, 379.) The employer's committee resisted, but finally agreed to this provision if the Union would postpone the effectiveness of this prohibition until May 1, 1938. The Union's committee consented and accordingly the standard contract was drawn so as to prohibit the dairy which employed union drivers from selling to brokers after said date. (R. 946.) This form of contract was submitted (R. 946-7), with the recommendations of the respective committees, to the interested parties, was approved by a vote of the members of the Union and, thereafter, submitted by the Union separately to each dairy for its independent acceptance or re-

jection. (R. 381-2, 517-8.) The contract was accepted by the great majority, but by no means by all of the dairies in the community, for at the time of the trial in the Court of Appeals there were some sixty (60) odd dairies operating in the Cleveland area which had no contract with the Union, and which were, apparently, able and ready adequately to supply the brokers. (R. 905-8.)

As the Court of Appeals found, this was clearly the adjustment of a valid labor dispute between employer and employee, whose sole objective was to negotiate a basis of pay and employment mutually acceptable and consistent with the protection of their own conflicting interests. The employer had every right to insist upon the commission basis which had prevailed for years in the industry, believing it necessary in order to assure the development of his business on the driver's route, the collection by the driver from the customer, the maintenance and appearance of the driver and his truck, etc. (R. 368-9.) Conversely, the driver had an equal right to insist that, if he were to work on a commission basis, he have the exclusive right to sell his employer's milk on his route and to require his employer to refrain from permitting his milk to be sold by brokers on the driver's route, since such practice had been actually proven destructive of the driver's commission and of his very job.

It is true that the Union's committee used every argument in attempting to persuade the employer to refrain from selling to brokers, the Union threatening to put the suspended strike in effect, and contending, among other things, that the broker was, in many respects, detrimental to the dairy industry, and that his elimination would not be detrimental but advantageous to the dairies themselves. However, it clearly appears from the Record that the employers were not persuaded by these arguments, and refused to give in until it was apparent that it was necessary to do so if the Union was to accede to the commission

basis. (R. 377-9, 940, 944-5, 396-8.) Surely this was a valid and sincere controversy between employer and employee whose sole purpose and objective was to reach a standard of employment and method of pay which was mutually acceptable and to avoid the calamitous consequences to themselves and to the public, resulting from a strike of the drivers of milk wagons.

Another contention made by the plaintiffs was that the defendants combined for the unlawful purpose of fixing prices. In 1937 and for years prior thereto, the driver's commission had been based upon the actual sale's price as fixed by his employer. (R. 941-3, 379-80.) These actual sales' prices varied greatly from dairy to dairy, especially in view of the fact that there were numerous wholesale discounts, and other adjustments or credits allowed by some dairies and not by others. (R. 941-3, 380-1.) As a result, the commission received by the drivers of one dairy for the same hours of work and for the sale of the same amount of milk might be much less than the commissions received by the driver of another dairy for the same sales and same work. This was naturally unsatisfactory to the drivers and their Union, and was one of the chief factors prompting the termination by the Union of the employment contract existing in the summer of 1937 and its demand for the substitution of the fixed salary for the commission. (R. 380-1, 941-3.)

When, after weeks of debate, the Union acceded to the commission basis, it required that these commissions be uniform so that whether or not the actual net sales' prices varied greatly from dairy to dairy, the amount of money paid as a commission to the driver per quart of milk sold by him should be uniform. After debating this subject for several days, it was agreed that the standard employment contract should so provide. (R. 941-3, 380-1.) Consequently, Article XXV thereof specifies that the commission should be computed and based upon certain specified prices

"regardless of the prices at which quarts of milk, bulk wholesale cream and bulk milk wholesale are actually sold * * *." As the Court of Appeals said:

> "Section XXV of the contract is not a price-fixing but purely a wage-fixing provision. It is an attempt to standardize the wages at a uniform rate for the drivers, dependent to some extent upon the energy and industry of the individual driver. The Dealer may sell his product for whatever price he chooses without any restriction or limitation imposed by this Section, but the wages are calculated upon a uniform and fixed basis."

The plaintiffs also alleged that the defendants combined for the purpose of creating a monopoly, but both trial courts which examined the facts found that no such purpose existed and that the actions of the defendants would not tend to create a monopoly in the marketing of milk. Instead, the Court of Appeals found that the sole purpose and objective of the defendants was to adjust a valid labor dispute, and that such adjustment did not tend toward a monopoly, saying:

> "Of course there is little substance to this argument for the obvious reason that the present purchasers from brokers will decide from whom they will buy when the brokers abandon their routes, whether from the larger or smaller dairies."

there being at least one hundred forty (140) dairies in Cuyahoga County. (R. 320.)

We have set forth the foregoing facts in such detail to demonstrate that the case presented from the outset merely an issue of fact, that the plaintiffs have simply failed to prove the existence of any tenable cause of action, let alone the infringement of any constitutional right, and also to demonstrate that no federal question is either involved in, or necessary to, the determination of the case which relates only to the interpretation of the Ohio Anti-Trust Act and principles of common law relating to illegal conspiracies.

LAW.

We presume that there can be no argument but that in order to establish the unconstitutionality of a state statute, it must appear that the statute requires the performance or observance of some act of commission or omission which would impinge upon some right arising under the Constitution. The only statute which the plaintiffs have referred to is the Ohio Anti-Trust Law, and there is no claim made that this statute does impinge upon any constitutional right. Instead the plaintiffs complain that this Act has been construed by all of the state courts as not being applicable to the actions of the defendants, that it has been construed as not being broad enough to protect that which they term their constitutional rights. Surely, no state statute is needed for the protection of any constitutional right. Consequently there can be no claim under such circumstances that the statute itself is unconstitutional.

This is not a case where a state legislature has, by statute, sanctioned a course of conduct which it is claimed infringes upon constitutional rights. Rather a situation is presented where a state, in the exercise of its police power, has by statute expressly prohibited a combination of two or more for the purpose of restraining trade or of creating a monopoly or of fixing prices. The state courts in construing this statute have held that the acts of the defendants did not constitute any such combination within the meaning of that statute.

The question whether this state statute was or was not applicable is a question solely for the state courts. Each of the three state courts has successively construed this statute as not being applicable. The Court of Common Pleas held that the plaintiffs had failed to prove their cause of action, and the Court of Appeals, upon a trial *de novo*, held that the weight of the evidence demonstrated that no cause of action existed under the statute in these circumstances.

No federal statute is involved. No mention is made in the pleadings, briefs or evidence of either the Sherman or the Clayton Acts. While a contention is set forth in the plaintiffs' brief that interstate commerce is involved, no reference to the record is made in substantiation of such claim. The only statement in the record which can conceivably bear on the subject is the statement of the witness Diltz (R. 819, 820) that he did not know the extent of the area from which the consumers in Cleveland derived their milk, but stated that, in his opinion, such areas extended for approximately one hundred (100) miles from Cleveland. There is, however, no evidence that the milk purchased by any of the defendant dairies originated beyond Ohio, or that any of the plaintiffs or any of the defendant dairies sold, or delivered their milk for sale, outside of the Cleveland area. Plaintiffs are, of course, local peddlers who purchase and sell their milk within the Cleveland area. Their actions taken alone clearly cannot constitute interstate commerce. Even if their activities are considered as an integral step or part of the flow of milk coming from the farm to the Cleveland consumer, there is no evidence that any farm at which any of the defendants' milk originates is outside of Ohio. Therefore, even if the plaintiffs had attempted to invoke the provisions of any federal statute relating to, and based upon, congressional power over interstate commerce, such attempt would necessarily have been unsuccessful.

The plaintiffs state, as their fourth proposition (see page 12 of their brief), that the state courts have held that the defendants' actions did not affect interstate commerce. As far as we can discover no such question was presented to, considered or decided by, any Ohio court, there having been no contention made nor evidence offered that any transaction in interstate commerce was involved nor any claim that any federal statute regulating interstate commerce was violated.

The plaintiffs also advance, as one of their reasons for granting the writ, that the Supreme Court of Illinois in *Meadowmoor v. Milk Drivers Union*, 371 Ill. 377, 21 N. E. (2d) 308, has rendered a decision directly contrary to that of the Supreme Court of Ohio in this case, so that unless this Court settles the resultant inconsistency there will be confusion. This, if true, would afford no ground for granting the writ. There is, however, no conflict between the decisions of the Supreme Court of Ohio and Illinois in these instances. In the *Meadowmoor* case the defendant union attempted to eliminate the competition of the brokers or vendors by intimidation, and acts of violence, including the overturning of the brokers' wagons, the throwing of bombs and explosives into the stores which purchased milk from the brokers, assaults by pickets patrolling such stores, the intimidation of their customers, etc. (21 N. E. (2d) at 315.) The Supreme Court of Illinois held that, independently of the legality of the purpose of the combination, the use of such unlawful means should be enjoined. We frankly admit that, if the defendants in this case had resorted to any such unlawful means, an injunction should have been granted by the Ohio courts. There is, however, not a scintilla of evidence that any such conduct occurred in this case; instead, the Union committee and the employers' committee negotiated privately a form of employment contract, no broker being present at these meetings nor being advised, threatened or otherwise notified of the negotiations until the contract had been formulated, approved by the members of the Union and submitted by it independently to each dairy for its acceptance or rejection. The negotiation by employer and employee of an employment contract through collective bargaining is certainly not an unlawful means of accomplishing the purpose of adjusting a valid and bona fide dispute as to acceptable terms of employment.

Further there is no conflict, as contended by the plaintiffs, between the decisions of the Ohio court in this case and those of this Court.

The case of *Duplex Co. v. Deering,* 254 U. S. 443, dealt with the actions of a labor union in attempting a secondary boycott and by that method to coerce customers of the plaintiff from dealing with it—again the use of unlawful or improper means.

The case of *Eastern States Retail Lumber Dealers Association v. United States,* 234 U. S. 600, again involves coercive measures and did not relate to any question of employment or labor. Further, both of these cases dealt with the construction of the Sherman or Clayton Acts, federal statutes which are not involved in this case.

As to the plaintiffs' fifth proposition (pg. 12 of their brief), that a labor union may not be used as the cloak to shield illegal activities, there is no controversy. No contention was or is made that a labor union has any greater rights under the law than any other association of employees or other individuals. Surely, however, the plaintiffs should concede that the laborer has as great a freedom of contract with respect to the sale of his services as the owner of property has with respect to the sale of his property. It is well established that the seller of property may require the buyer to refrain from using it in a certain territory in which the seller continues in business. *Oregon Steam Navigation Co. v. Winsor,* 87 Wall. 64, 68 and 69. Consequently the seller of services should be as free to require the purchaser of his service to refrain from creating competition for the seller of the service.

The principles of common law applicable to this situation, and in the light of which anti-trust statutes are commonly construed, have been clearly established and demonstrate the legality of the purpose and actions of the defendants. As this Court has said (*Duplex Co. v. Deering,* 254 U. S. 443 at 465):

> "The accepted definition of a conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or to

accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. *Pettibone v. U. S.*, 148 U. S. 197, 203. If the purpose be unlawful it may not be carried out even by means that otherwise would be legal; and although the purpose be lawful it may not be carried out by criminal or unlawful means."

The inquiry thus resolves itself into two aspects,—first the purpose or intent activating and forming the chief objective of the defendants; and, second, the means utilized to accomplish such purpose or objective. As the Court of Appeals has held, the purpose of the defendants was to adjust a valid and bona fide labor dispute, the defendant Union demanding a straight salary, the employers insisting upon a commission basis, the Union finally conceding to the commission basis only upon the condition that the union driver be contractually assured that he would be the only person selling his employer's milk upon his route, and the employer finally acceding to this condition.

The law has been settled for years that a group of employees may, to protect their own interests, require an arrangement with their employer whereby the latter must give them all of his work or they will do none of it. The fact that third persons are injured thereby affords such persons no right of action.

In *Senn v. Tile Layers Protective Union*, 301 U. S. 468, the union of tile layers refused to work for Senn, a tile laying contractor, unless Senn would give them all of his work and agree to refrain from the actual laying of tile himself. Senn sought to enjoin the Union from peacefully picketing his shop in order to enforce this demand. Senn appealed to this Court from an adverse decision of the state courts, claiming that his property was taken without due process, that he had been denied equal protection of the laws, and that his right to work in his own business was guaranteed by the Fourteenth Amendment. This Court affirmed the action of the state courts in denying relief to Senn, stating:

"The end sought by the unions is not unconstitutional * * *. The unions acted and had the right to act as they did to protect the interests of their members against the harmful effect upon them of Senn's action.

"* * *

"There is nothing in the federal Constitution which forbids unions from competing with non-union concerns for customers by means of picketing as freely as one merchant competes with another by means of advertisements in the press, by circulars, or by his window display. Each member of the unions, as well as Senn, has the right to strive to earn his living. Senn seeks to do so through exercise of his individual skill and planning. The union members seek to do so through combination. Earning a living is dependent upon securing work; and securing work is dependent upon public favor. To win the patronage of the public each may strive by legal means. Exercising its police power, Wisconsin has declared that in a labor dispute peaceful picketing and truthful publicity are means legal for unions. It is true that disclosure of the facts of the labor dispute may be annoying to Senn even if the method and means employed in giving the publicity are inherently objectionable. But such annoyance, like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by the Constitution. Compare *Pennsylvania Railroad Co. v. United States Railroad Labor Board*, 261 U. S. 72. It is true, also, that disclosure of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped-for job is not property guaranteed by the Constitution. And the diversion of it to a competitor is not an invasion of a constitutional right."

There are many other cases supporting the same proposition. Probably the case most frequently cited is *National Fireproofing Company v. Mason Builders Association*, 169 Fed. 259 (C. C. A. Second Circuit (1909)). The plaintiff company manufactured and installed hollow tile in buildings. The defendant association comprised the bulk of the

mason contractors in the city of New York. The defendant Union comprised substantially all of the bricklayers in the city of New York. The Association and Union had entered into a contract prohibiting the mason contractor from subletting any part of the masonry work on any job where union bricklayers were employed. Consequently, the plaintiff which did not do general masonry but only installed hollow tile could not secure sub-contracts for the installation of tile. Plaintiff sought to enjoin the performance of the contract as constituting a restraint of trade tending to create a monopoly and designed to injure the plaintiff. The trial court dismissed the bill of complaint holding that the test of the legality of the agreement and combination between the mason contractors and union bricklayers was its primary purpose and true object; that since such object was the promotion of the interests of the parties thereto, the agreement and combination was lawful even though incidental injury was suffered by the plaintiff.

The Court of Appeals affirmed, stating:

> "* * * As a general rule it may be stated that, when the chief object of a combination is to injure or oppress third persons, it is a conspiracy; but that when such injury or oppression is merely incidental to the carrying out of a lawful purpose, it is not a conspiracy. Stated in another way: A combination entered into for the real malicious purpose of injuring a third person in his business or property may amount to a conspiracy and furnish a ground of action for the damages sustained, or call for an injunction, even though formed for the ostensible purpose of benefiting its members and actually operating to some extent to their advantage; but a combination without such ulterior oppressive object, entered into merely for the purpose of promoting by lawful means the common interests of its members, is not a conspiracy. A laborer, as well as a builder, trader, or manufacturer, has the right to conduct his affairs in any lawful manner, even though he may thereby injure others. So several laborers and builders may combine for mutual ad-

> vantage, and, so long as the motive is not malicious, the object not unlawful, nor oppressive and the means neither deceitful nor fraudulent, the result is not a conspiracy, although it may necessarily work injury to other persons. The damage to such persons may be serious—it may even extend to their ruin—but if it is inflicted by a combination in the legitimate pursuit of its own affairs, it is *damnum absque injuria.* The damage is present, but the unlawful object is absent. And so the essential question must always be whether the object of a combination is to do harm to others or to exercise the rights of the parties for their own benefit."

The court cites and quotes, from many decisions, excerpts in support of the foregoing, namely, the celebrated English case of *Mogul Steamship Co. v. McGregor,* Law Reports 21 Q. B. 552 and L. R. (1892) A. C. 25 at 56; *National Protective Assn. v. Cumming,* 170 N. Y. 315 at 328 where it is said:

> " 'The struggle on the part of the individuals to prefer themselves, and to prevent the work which they are fitted to do from being given to others, may be keen and may have unhappy results in individual cases; but the law is not concerned with such result, when not caused by illegal means or acts.' "

Vegelahn v. Gunter, 167 Mass. 92; *Allis-Chalmers Co. v. Iron Moulders' Union,* 150 Fed. 155; *Allen v. Flood,* L. R. (1898) A. C. 1, at 164; *Quinn v. Leatham,* L. R. 1901, A. C. 495.

The court further said that the object of the contract was to make the stipulation of the agreement generally effective.

> "* * * The mason builders joining in the agreement being bound by its stipulation, it was necessary for their protection that competing outside builders should only employ bricklayers upon the same conditions. So it was for the advantage of the bricklayers themselves to have means for enforcing uniformity in terms of employment."

The court also indicated that an unlawful combination or conspiracy might exist where the object was lawful but was accomplished by unlawful means, and, therefore, considered whether or not the statements or threats by the union to strike in the event that a mason contractor sublet the fireproofing was the use of unlawful means. In this connection the court said:

> "As indicated in the statement of facts, no threats or acts of intimidation except in connection with the enforcement of clause 5 are shown. Instances do appear, however, in which bricklayers struck and ceased to work because they claimed that work was being done in violation of this clause. So, statements were made by members of the Builders' Association and of the unions that the complainant would not be permitted to take separate contracts for the installation of fireproofing. It is unnecessary to review the acts of the defendants in detail. We are not satisfied that if the defendants or their representatives made threats, they threatened to do anything which they had no right to do. The object of the agreement was not unlawful. The defendants had the right to strike to secure its enforcement. They also had the right to notify the complainant and persons with whom it had dealings that it could not take contracts for the installation of fireproofing contrary to the terms of the agreement without incurring its penalties. But a threat to do that which a person has the right to do is not unlawful. * * *"

This case and the *Senn* case (*supra*) cannot logically be distinguished from the one before the Court. The Union stated in effect to the employer that the employer could take his choice—if he wanted to Union to do his work he must let the union members do all of it or else they would do none of it. This is exactly what the Milk Drivers Union demanded of the defendant dairies, namely, that if the defendant dairies wanted to employ members of the Drivers Union they could only do so upon terms granting the union drivers the right to deliver all of the employ-

er's milk. In the *Senn* and *Fireproofing* cases the only advantage apparently gained by the union was an increase in the volume of the work to be performed by its members and it was held that the attainment of that advantage was a lawful and proper purpose which could be secured by means of the contract. In the present case the Drivers Union was not only interested in securing a larger volume of deliveries but especially of ridding its drivers of a ruinous and unfair competition with which the drivers were powerless to compete and which threatened to curtail the existing volume of work which they had previously enjoyed.

Pickett v. Walsh, 192 Mass. 527; 78 N. E. 753. The plaintiff stone pointers finished the masonry joints of a building, which work was also done by the ordinary bricklayer, but at a higher cost and in an inferior manner. The Union of bricklayers claimed the right to do the pointing, and by agreement provided that no union bricklayer would work on a building unless the union bricklayers were to do the pointing. Since the stone pointers could not do general masonry they were thrown out of employment, although the contractors preferred to use them. Plaintiffs sought an injunction, claiming that the agreement or action of the Union constituted an unlawful combination in restraint of trade. The Supreme Court of Massachusetts held no unlawful combination to exist, but that the bricklayers, being primarily activated by the protection of their own interests, were justified in demanding that they do all of the work, including the pointing, or that they would do none of it. The Supreme Court said:

> "The defendants in effect say we want the work of pointing the bricks and stone laid by us, and you must give us all or none of the work." * * *
>
> "The right which the defendant unions claim to exercise in carrying their point in the course of this competition is a trade advantage, namely, that they have labor which the contractors want, or, if you please, cannot get

elsewhere; and they insist upon using this trade advantage to get additional work, namely, the work of pointing the bricks and stone which they lay. * * * But having regard to the right on which the defendants' organization as a labor union rests, the correlative duty owed by it to others, and the limitation of the defendants' rights coming from the increased power of organization, we are of the opinion that it was within the rights of these unions to compete for the work of doing the pointing and, in the exercise of their right of competition, to refuse to lay bricks and set stones unless they were given the work of pointing them when laid."

The court said that the result of this combination was hard on the contractor who could get the work done cheaper and better by pointers and that "so far as the pointers who cannot lay brick and stone are concerned, the result is disastrous. *But all that the labor unions have done is to say you must employ us for all the work or none of it.*"

"* * * So far as the labor unions are concerned the contractors can employ pointers if they choose, but if the contractors choose to give the work of pointing the bricks and stones to others, the unions take the stand that the contractors will have to get some one else to lay them. The effect of this in the case at bar appears to be that the contractors are forced against their will to give the work of pointing to the masons and bricklayers. But the fact that the contractors are forced to do what they do not want to do is not decisive of the legality of the labor union's acts. That is true wherever a strike is successful. The contractors doubtless would have liked it better if there had been no competition between the bricklayers and masons on the one hand and the individual pointers on the other hand. But there is competition. There being competition, they prefer the course they have taken. They prefer to give all the work to the unions rather than to get non-union men to lay bricks and stone to be pointed by the plaintiffs.

"Further, the effect of complying with the labor unions' demands apparently will be the destruction of the plaintiff's business. But the fact that the busi-

> ness of a plaintiff is destroyed by the acts of the defendants done in pursuance of their right of competition is not decisive of the illegality of them. It was well said by Hammond, *J.*, in *Martell v. White*, 185 Mass. 255, 260, 69 N. E. 1085, 1087, 64 L. R. A. 260, 102 Am. St. Rep. 341, in regard to the right of a citizen to pursue his business without interference by a combination to destroy it: 'Speaking generally, however, competition in business is permitted, although frequently disastrous to those engaged in it. It is always selfish, often sharp, and sometimes deadly.' "

The Court held that while another situation and result might arise if it had been shown that the defendants' combination was formed primarily for the purpose of injuring the plaintiffs that no such situation existed in this case, since the defendants were acting primarily for the purpose of promoting their own interests in getting work from the plaintiffs to which they felt they were legitimately entitled under competitive situations.

Here again, as in the case at bar, the union men stated that if they were going to deliver any of the milk or do any of the masonry they must have all of their employers' work of that type. The case at bar is even stronger than either of the foregoing cases where the masons received a fixed hourly wage but were simply trying to get more work to do. The milk driver, however, was forced to work for a commission and on a route where he was supposed to have the exclusive right to sell his employer's milk. The employer's sales to brokers not only prevented his acquisition of new customers, but tended to and did deprive him of customers or work that he already had.

There are numerous other labor cases of like effect where the courts have held it proper for laboring men, acting primarily for the protection or advancement of their own interests, to require their employer to refrain from an act which would result in giving a certain portion of the work to others, or would deprive the union men of work

which they were capable of performing, even though this resulted in direct injury to third persons. See *Mayer v. Journeymen's Stone Cutters Assn. et al.*, 47 N. J. Eq. 519, 20 Atl. 492; *National Protective Association of Steam Fitters v. Cumming*, 170 N. Y. 315, 65 N. E. 369.

An interesting and applicable case is *Edelstein v. Gillmore*, 35 Fed. (2nd) 723 (C. C. A. (2nd) 1929), Certiorari denied, 75 L. Ed. 650. Equity was a union of some eight thousand actors in New York, which adopted a rule that none of its members could employ a type of agent known as a personal representative except upon certain specified terms and commissions, and that if any such agent had contracts on other terms with any member of Equity, no further contract should be granted him, unless the existing ones were first conformed to the rules so adopted. The plaintiff was such an agent, having contracts with certain actors on terms more favorable to him than were permitted by the rules, which he was unwilling to modify, and therefore could not secure additional contracts of employment. The plaintiff was granted an injunction by the District Court on the ground that the action of the union members was an unlawful combination designed to drive him from business and to interfere with his existing contracts. The Circuit Court reversed. It found that the enforcement of these rules would drive the plaintiff from business unless he complied therewith, but held that since the motive prompting the rules was the controlling factor and that the primary motive or purpose was to promote the interests of the union members and to prevent their exploitation by such agents as the plaintiff, the actions taken by the Union were lawful and proper. The Court said:

> "* * * Hence the requirement that, as a condition to writing new business with Equity's members, old contracts with its members must be made to conform to the new standard, does not seem to us to justify an inference that the primary purpose of the requirement is infliction of injury upon plaintiff, and other

personal representatives in a similar situation, rather than the protection of the supposed interests of Equity's members. The terms they insist upon are calculated to secure from personal representatives a more impartial service, at uniform and cheaper rates, and to improve conditions of employment of actors by theater managers. Undoubtedly the defendants intend to compel the plaintiff to give up rights under existing contracts which do not conform to the new standards set up by Equity but as already indicated, their motive in so doing is to benefit themselves and their fellow actors in the economic struggle. The financial loss to plaintiff is incidental to this purpose. See *Gill Engraving Co. v. Doerr*, 214 F. 111, 120 (D. C. S. D. N. Y.).

"Whether in their relations to personal representatives Equity members are to be deemed a combination of employers, as appellants contend, or a 'labor union,' as appellee insists, is a matter disputed. To us it appears that in fact the policy adopted is aimed at improving their position from both aspects; but whether they be viewed as employers or employees would seem to make no difference. Counsel agree that both employers and laborers may respectively organize to strengthen their bargaining power in the economic struggle, and that the legal principles applicable to each group are the same. The motive of benefit to the industrial group will often justify a collective refusal to deal with one who will not accede to terms which promote the interests of such group, whether it be composed of laborers or of employers. See *Nat. Fireproofing Co. v. Mason Builders' Assn.*, 169 F. 259, 269, 26 L. R. A. (N. S.) 148 (C. C. A. 2); *Nat. Protective Assn. v. Cumming*, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648; *Bossert v. Dhuy*, 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D, 661; *Wilson v. Hey*, 232 Ill. 389, 396, 83 N. E. 928, 16 L. R. A. (N. S.) 85, 122 Am. St. Rep. 119, 13 Ann. Cas. 82; *Macauley Bros. v. Tierney*, 19 R. I. 255, 33 A. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; *Booker & Kinnaird v. Louisville Board of Fire Underwriters*, 188 Ky. 771, 224 S. W. 451, 21

A. L. R. 531. We think that that motive supplies justification in the instant case. Therefore, unless we must say that because of Equity's control over the supply of actors in New York City, it is illegal to exercise their combined power against the plaintiff by collective refusal to deal with him until he obtains a permit, we see no basis for the injunction. Whether the welfare of society requires the curtailment of economic power when the group which exercises it is in complete control of a particular industrial or commercial field would seem to be a problem more appropriate for the Legislatures than for the courts. But, in any event, no authority has been cited which appears to require us to hold illegal the threatened refusal of Equity's members to deal with plaintiff except upon the terms proposed. On the contrary, the cases most nearly in point sustain the appellants. See *Tannenbaum v. N. Y. Fire Ins. Exch.*, 33 Misc. Rep. 134, 68 N. Y. S. 342; *City Trust Co. v. Waldhauer*, 47 Misc. Rep. 7, 95 N. Y. S. 222; *Macauley Bros. v. Tierney, supra*; *Am. Livestock Comm. v. Chicago Livestock Exchange*, 143 Ill. 210, 32 N. E. 274, 18 L. R. A. 190, 36 Am. St. Rep. 385; cf. *Boutwell v. Marr*, 71 Vt. 1, 42 A. 607, 43 L. R. A. 803, 76 Am. St. Rep. 746."

There are many other cases from other jurisdictions establishing this general principle that it is within the rights of a labor union to advance the economic interests of its own members by compelling the employers in a community to agree that they will give the members of that union all of their work or additional work even though by so doing third persons are injured or ruined. For example, see *National Protective Association v. Cumming*, 170 N. Y. 315; *Vegelahn v. Guntner*, 167 Mass. 92; *Allis-Chalmers Co. v. Iron Moulders Union*, 150 Fed. 155; *Allen v. Flood*, L. R. (1898) A. C. 1, at 164; *Rosen v. United Shoe and Leather Workers Association*, 287 Ill. App. 49, 4 N. E. (2d) 507; *Gill Engraving Co. v. Doerr*, 214 Fed. 111; *Burnham v. Dowd*, 217 Mass. 351, 104 N. E. 841; *Nissen v. Andress*, Supreme Court of Oklahoma, 1936,

63 Pac. (2d) 47; *P. Reardon, Inc. v. Caton*, 178 N. Y. S. 713 and 178 N. Y. S. 722; *Aeolian v. Fischer*, 27 Fed. (2d) 560; 29 Fed. (2d) 679 and 35 Fed. (2d) 34; *Clemitt v. Watson*, 14 Ind. App. 38, 42 N. E. 367; *Carter v. Oster*, 134 Mo. App. 146, 112 S. W. 995.

CONCLUSION.

In conclusion, therefore, we respectfully submit that no constitutional right of the plaintiffs has been violated. No federal question was either necessary to or has been decided in this case, or properly presented to the Supreme Court of Ohio. Instead, the courts of Ohio, including the Supreme Court of the state, have construed the anti-trust statutes of that state as being inapplicable to the actions of the defendants and that under the common law of Ohio no actionable wrong has been suffered by the plaintiffs. Any attempt to enjoin the performance of a contract expiring on September 30, 1940, prior to the hearing of the plaintiffs' petition, would be abortive so that the case presented is in reality a moot one. No interstate commerce is affected and the generally recognized and established principles of common law sanction the actions of the defendants in protecting the competitive interests of employees through the negotiation of the employment contract in question.

Respectfully submitted,

RAYMOND T. JACKSON,
CLAYTON A. QUINTRELL,
Counsel for Respondent.

APPENDIX A.

Opinion of the Court of Appeals.

IN THE COURT OF APPEALS.

STATE OF OHIO, EIGHTH DISTRICT,
CUYAHOGA COUNTY.

No. 16,908.

RAY RITTER,
Plaintiff-Appellant,

vs.

MILK & ICE CREAM DRIVERS AND DAIRY EMPLOYEES UNION, LOCAL NO. 336, *et al.*,
Defendants-Appellees.

OPINION.
January 2, 1940.

LIEGHLEY, *J.*:

The evidence reduced to writing with all exhibits is before this Court. Any attempt to summarize the same would require the number of pages contained in one of the main briefs. There can be little dispute about what the evidence is. Sharp conflict arises over what inferences may reasonably and logically be drawn, what fair and reasonable conclusions may be and should be deduced therefrom, and what construction should be placed upon the whole situation as established by the evidence. What was the ultimate object and purpose of all the negotiations, of all the acts, words and deeds said and done or not said and done by each and all of the parties hereto as disclosed by the evidence or reasonably inferred therefrom. The proper answer to this inquiry will solve this problem.

It is the contract of October, 1937, involved herein, executed by the Union as one party, and the Milk Dealers, as the other,—each dealer signing a separate but like contract with the Union. Plaintiffs, Brokers, seek an order nullifying this contract, upon the claim that it is the result of a conspiracy between the Union and the Milk Dealers to fix prices, to eliminate competition, to create a monopoly, and put the plaintiff Brokers out of business. To sustain their claim, the plaintiffs depend for the most part upon the minutes of a large number of meetings held over a period of weeks by the Committees of the Union and the Dealers, which minutes appear to record the remarks, comments, demands and arguments of the members of the Committees. Their differences, whether genuine or otherwise, through the negotiations evidenced by the minutes of these meetings, finally were adjusted in manner and form as expressed by the written contract involved in the litigation.

The Brokers are independent operators. They own their own equipment and buy their milk supply already bottled and capped at the platforms of the dealers and then peddle the same on their own respective milk routes established by each Broker.

The Union demanded, and the contract provides that the Union shall deliver all milk of the dealer signing said contract with the Union. The Brokers say this cuts off their supply of milk, and doubtless does close the door of such contracting dealer to all Brokers, but does not close the door of any Dealer not under contract with the Union, nor any other source of supply than Dealers under such contract. But the Brokers say that all are under contract and the result is no milk supply obtainable or available to them and they are out of business.

The contract provides for a "closed-shop," the handling and delivery of the entire milk supply of a Dealer by Union members and wages of milk drivers paid upon a commission basis. It is said that the Union demanded a closed-shop and a standardized weekly or hourly wage.

The Dealers insisted upon the commission method of pay. The Union agreed to the latter only upon condition that it handle or deliver the whole supply of the Dealer, to eliminate thereby the ever-present competition of the Broker receiving his milk from the Dealer who at the same time has Union drivers on the streets delivering milk on the Dealer's account with routes overlapping those of the Brokers.

The Union insisted that if pay shall be by commission, the employer should not create competition for the employee, by delivering milk to the Broker with the same labels on the bottles, the same color scheme on the wagon, the driver with like regalia, and thus create an ideal setup for price cutting at the expense of wages by commission.

But the Brokers say all these alleged attempts to negotiate by the Union and the Dealers amounts to nothing more or less than a staging or make-believe with a real underlying design and unlawful primary purpose of getting rid of Brokers. While no one qualified or authorized says so, the only reasonable inference from what was said and done, it is claimed clearly establishes that such was their nefarious design and scheme.

Certain it is, that if the Union and Dealers were jointly intending and conniving to get rid of the Brokers as their chief objective, and these many meetings of their Committees had and held over a period of weeks were merely pretended or secondary considerations to give legal coloring to their prime objective, the performance of this contract should be enjoined.

If, however, there existed at that time, real substantial controversies in the milk industry between the Union and the Dealers, which called for adjustment and settlement to avoid imminent economic strife and threatened strike, and such was the outstanding paramount objective of the contending parties dealing adversarily, then the performance of this contract should not be enjoined, even though

the result be that the sources of milk supply from these dealers to these Brokers be terminated.

The principle of the closed-shop has become a recognized legal status to be attained through negotiations between Employer and Employee. Seldom does a large factory or industry establish a closed-shop that there are not some victims strewn along the pathway—victims in the sense that the sphere and opportunities of employment to the non-union man are restricted or extinguished. Unlawful conspiracy cannot be and should not be inferred from the fact alone that some Brokers are without milk supply as a result of a closed-shop contract between the Union and Dealers, negotiated and executed in adjusting their labor relations. Many a former profitable corner grocery and drug store has been annihilated in the evolution and growth of the chain stores. It seems to be the order of the day.

The right of collective bargaining between Employer and Employee is recognized and established at present in our industrial activities with respect to wage, hours and working conditions. It is recognized and encouraged even by high authority.

With the right to insist upon a closed-shop contract, and the right to bargain as to wages, it is doubtful if anyone would challenge the legality of this contract but for the seeming calamity to the Brokers. Of course, the Brokers may sell their equipment and routes, or they may seek other sources of supply, or join the Union and drive and sell for the Dealers direct. It should be noted that this contract makes no reference to Brokers. Their misfortune is a mere incidental consequence, if the contract be otherwise legal.

A thoughtful consideration of all the facts and circumstances of this case compels the inescapable conclusion that the plaintiffs have not sustained their burden of proof. The inferences and conclusions drawn have the element of plausibility but fall short of establishing the probability of their claims.

On the other hand, the claims of the defendants that this contract expresses the terms of settlement of a genuine labor dispute, adversarily negotiated and concluded, seem to be supported by the greater weight of the evidence.

It is our opinion and judgment that real disputes existed when the Union, in August, notified the Dealers that their contract would not be renewed. There was dissatisfaction with the wage schedule, calling for readjustment in the minds of the employees. When the employers stood firmly for wages on commissions, the demand that the Union deliver all the milk of the Dealer in order to protect his wage, became a proper factor or item for collective bargaining. This contract was the result of the contentions and demands of opposing forces. The primary objective was the solution of economic differences between the Dealers and the Union to avoid a calamitous strike in the milk industry, and all the hardships and suffering that would ensue.

It was said that many Dealers do not want this contract, which, if true, is not controlling. They signed the contract. Doubtless some members of the Union would prefer some other form of contract. In collective bargaining, the majority rules.

It was said that some of the larger Dealers do not sell to Brokers, but that they keenly desire the Brokers eliminated in order to get the sale of thirty thousand (30,000) quarts of milk per day now disposed of by Brokers. Of course, there is little substance to this argument for the obvious reason that the present purchasers from Brokers will decide from whom they will buy when the Brokers abandon their routes, whether from the larger or smaller dealers.

It is our conclusion that Section XXV of the contract is not a price-fixing but purely a wage-fixing provision. It is an attempt to standardize the wages at a uniform rate for the drivers, dependent to some extent upon the

energy and industry of the individual driver. The Dealer may sell his product for whatever price he chooses without any restriction or limitation imposed by this Section, but the wages are calculated upon a uniform and fixed basis.

The Brokers insist there was a conspiracy between the Union and the Dealers with the unlawful purpose and plan to get rid of Brokers. If it was the wish of the majority of the Dealers, motivated by a conviction that it would be for the best interests of their business, it would seem feasible to accomplish this end by agreement among themselves not to sell to them, without joining in an unlawful combination with the Union. If the desire originated with the Union and by it insisted upon, as it did, then the matter was a lawful subject for inclusion in the list of subjects of collective bargaining to the extent that the activities of the Brokers rendered insecure and uncertain the amount of their pay by commission.

In short, and finally, the misfortunes of the Brokers are but the incidental result of the terms of a contract between the Dealers and the Union, entered into in settlement of a labor controversy by bargaining at arm's length and the consequences to these brokers are not unlike those experienced among others under similar circumstances in other labor disputes.

The conclusion is that injunctive relief should be denied, and the petition dismissed at costs of the plaintiffs.

Exceptions may be noted.

TERRELL *P.J.*, and MORGAN *J.* concur.

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 354.

RAY RITTER, *et al.*,
Petitioners,

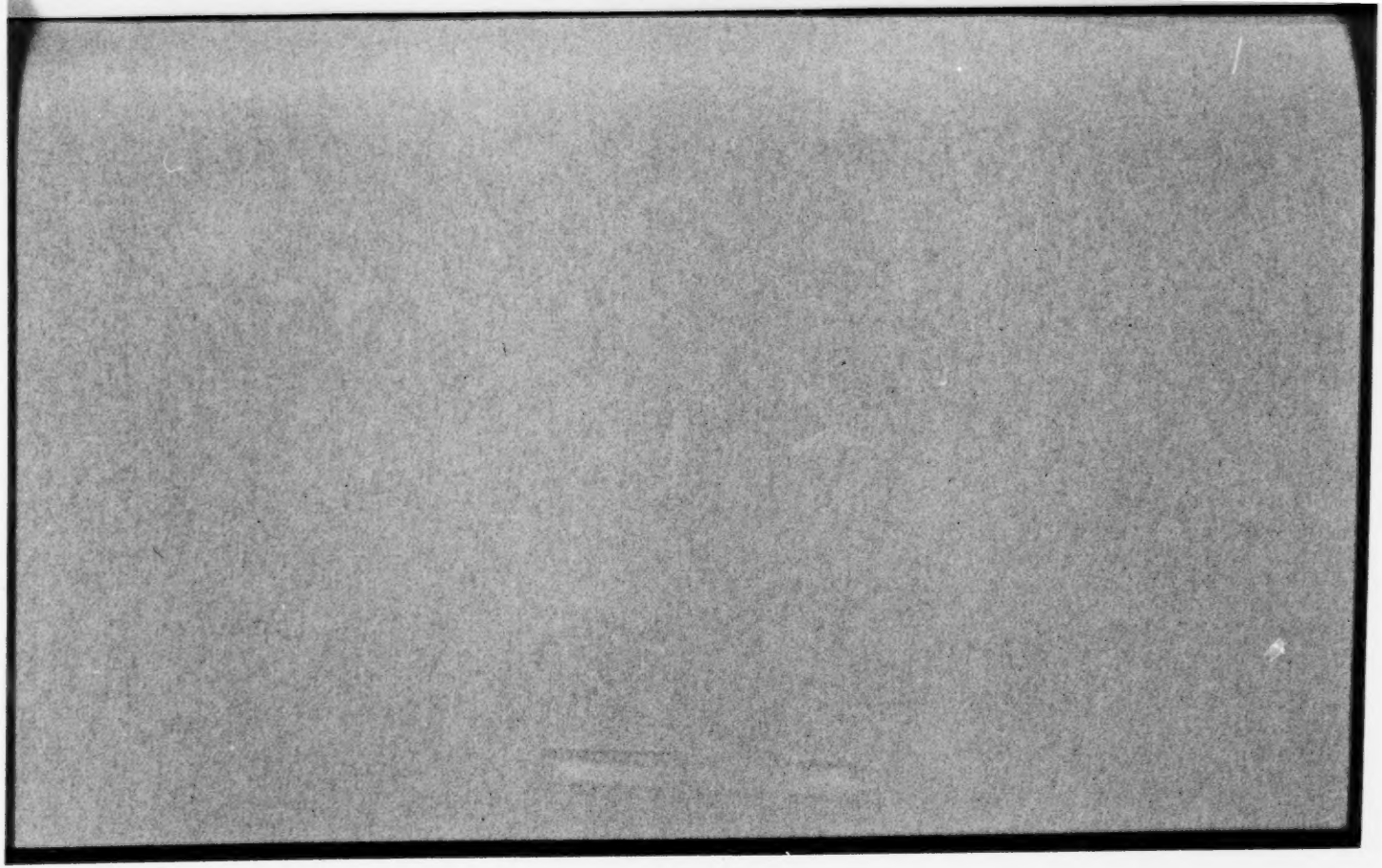
vs.

MILK AND ICE CREAM DRIVERS AND DAIRY EMPLOYEES UNION, Local 336, *et al.*,
Respondents.

MEMORANDUM OF RESPONDENT, THE TELLING-BELLE VERNON COMPANY, RE PETITIONERS' MOTION TO DISPENSE WITH PRINTING PORTIONS OF THE RECORD.

RAYMOND T. JACKSON,
CLAYTON A. QUINTRELL,
Union Commerce Bldg.,
Cleveland, Ohio,
Counsel for Respondent, The Telling-Belle Vernon Company.

THE GAYES LEGAL PUBLISHING CO., CLEVELAND, OHIO



In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 354.

RAY RITTER, *et al.*,
Petitioners,

vs.

MILK AND ICE CREAM DRIVERS AND DAIRY EMPLOYEES UNION, Local 336, *et al.*,
Respondents.

MEMORANDUM OF RESPONDENT, THE TELLING-BELLE VERNON COMPANY, RE PETITIONERS' MOTION TO DISPENSE WITH PRINTING PORTIONS OF THE RECORD.

The petitioners have filed their motion in this Court, seeking to condense the Record which is to be printed. This motion contains various allegations as to the unwillingness of this respondent to stipulate for the condensation of the Record, which this respondent denies.

The crux of the case is a question of fact, namely, the primary purpose or intent of the defendants in negotiating an employment contract. Everything which was said by any of the defendants in these negotiations is contained verbatim in Exhibits 5-A to 5-U inclusive, so that these exhibits are, in the final analysis, the accurate and complete source from which this question of fact should be determined rather than the excerpts from these exhibits culled by the petitioners and read into the Record.

Despite this, and for the purposes of economy, this respondent hereby stipulates that the following may alone be printed as the Record to be used by this Court:

1. Petition and amended petition of the Petitioners filed in the Court of Common Pleas and Court of Appeals; answers thereto of this respondent, The Telling-Belle Vernon Company, and of the respondent Union; reply of the petitioners; transcript of the docket and journal entries in each of the State Courts and the opinions rendered by each of the State Courts.

2. Petitioners' (plaintiffs-appellants) Exhibit I, being the notice of Fairmont Creamery to brokers; Exhibit 2, being the form of contract negotiated in the fall of 1937; and respondent Union's Exhibit A, being the form of contract demanded by the Union prior to negotiations in the fall of 1937.

3. The Narrative Statement of Evidence filed by petitioners but amended and supplemented as set forth below:

Narrative Statement Page No.

3—Second paragraph, third sentence—to read: "The Union presented the dairies with a form of contract before negotiations were commenced." (R. 322.)

Second paragraph, fourth sentence to read: "He stated that this first contract in August 1937 specified different hours than the contract finally negotiated by the committees." (R. 323.)

Last paragraph, next to last line to read: "who has no building and plant and bottling." (R. 327.)

4—Change last sentence to read: "If the brokers were eliminated from competition, their customers would obtain their supply elsewhere and The Telling-Belle Vernon Company would possibly get its share of those customers and of the business thus lost by the brokers, and it would continue its existing efforts to obtain such business." (R. 339.)

6—Sixth line from top—insert the following sentence: "The Telling-Belle Vernon Company is affected by

brokers only to the degree that competition by every other dealer affects it." (R. 348.)

Change the first sentence of the second paragraph to read: "The witness denies that the brokers are price cutting, but, being asked to assume that they are price cutting, states that, based upon this assumption, their elimination would tend to stabilize the industry." (R. 350.)

7—Add at the end of the first paragraph the following sentence: "The committee of dealers had no authority to obligate any dairy." (R. 363.)

Second paragraph, fourth line—add the following sentence: "The committee members at these meetings discussed primarily the contract which the Union had presented. Any discussion of other subjects was a mere incident." (R. 365.)

Last paragraph, first line—change to read: "In October, 1937, the Union insisted that its contract containing demands for wages * * *." (R. 366.)

Last paragraph, next to the last line—add to the sentence "The incentive is thus greater" the following: "and the driver will be more certain to make collections for the milk sold." (R. 368.)

9—Sixth line from end of Jones' direct testimony—change to read: "The contract was thereafter presented by the Union and signed by The Telling-Belle Vernon Company." (R. 382.)

11—Eliminate everything from the sentence beginning on the ninth line from the end of the page to the cross examination of C. L. Dilts beginning on page 12, and substitute the following: "There was a discussion during these meetings concerning the brokers, and the witness believes that some person, whose identity he cannot recall, stated that the brokers were not good for the business, but is unable to testify that any statement was made in the joint meetings of the two committees that the brokers should be definitely eliminated, but such a statement might have been made by some member

of the employers' group. But he and Mr. Baxter opposed any contractual provision designed to eliminate the brokers and each of them believes that such a provision would be illegal and was wrong in principle. The broker situation was discussed by all members of the committee. Some persons, he believes, made the statement that the brokers were a bad influence and detrimental to the business. Some of the negotiators felt that the brokers could purchase a cheap truck and furnish 'just that much more competition in the field.' He was opposed throughout the negotiations to any contractual provision eliminating brokers or which would adversely affect them, and so stated to his own committee as well as in the joint meetings of the two committees; some members of the employers' committee agreed with him and others did not. He would say that Jones did not agree with him, but that Messrs. Baxter and Trsek agreed with him. After the contract containing Article 34 was finally negotiated, a copy was presented to him by the Union. He then sent the contract to his Home Office and, upon its return, finding that certain other dairies had signed it, he finally signed the agreement believing that it was necessary to do so if he did not want to get into any trouble about it." (R. 398 to 413.)

12—Sixth line from the bottom—change the sentence beginning in that line to read: "The milk is delivered to brokers in bottles of the company bearing the company's cap, but some bottles are of the universal type." (R. 792.)

13—Change the testimony of C. L. Dilts on cross examination contained on this page to read: "His company has its own wholesale customers (i.e. stores, restaurants, hotels, etc.) and delivers to these customers through drivers employed by it and operating its wagons, and sells the rest of its milk to brokers who deliver it in the same bottles, bearing the same caps and in wagons bearing the Fairmont name. The company's responsibility with reference to milk sold to brokers ends at the com-

pany's delivery platform. (R. 796 and 797.) The dairies' committee had no authority to obligate anyone. It was formed for the purpose of negotiating an employment agreement which would be fair to both sides, and, having done so, to submit such an agreement with its recommendation to the distributors in the city, or to recommend the contract as being the best it could obtain. (R. 798.) The witness remembers that a strike ultimatum was made by the Union; that the Union stood pat; but his committee never took the position of not being willing to continue negotiations. He believes that a strike was called to be effective on October 11th, and recalls that his committee established headquarters at the Statler Hotel and met on October 9th and October 10th. The question of wages was an important issue, and remained undecided at the time of the call of the strike. The Union wanted a weekly wage, but the employers demanded, and had insisted for years, upon the pay being based principally upon a commission. (R. 804.) Mr. Corrigan came into the negotiations on October 10th and persuaded the Union to resume negotiations. (R. 805.) The two committees then went over the contract to ascertain the matters which were not in dispute. Quite a number of matters were in dispute, the matter of pay being the crux of the issue. (R. 806.) Corrigan requested an examination of the dealers' books. The witness had to get permission for such an examination from his home office. (R. 807.) And other members of the committee believed they had to submit that question to the dairies. Negotiations started anew, first on inconsequential matters as to which there was no disagreement. The committees worked from October 11th to October 21st, and then took the agreement back to the dairies as the best they could do. The contract was later mailed to him and then sent to his home office and was thereafter returned to him. Mr. Dilts always objected to the provision whereby all delivery of dairy products of his company had to be through members of the

Union, because he knew that, by reason thereof, he could not make delivery to brokers. He opposed this provision in committee meetings and spoke against it on many occasions. Upon the return of the contract from his home office he signed it because he believed that otherwise there might have been a strike. The Union was the one which made the demand that, if its members were to work on a commission basis, its members must deliver all of the employers' milk." (R. 815.)

14—Fourth line—change to read: "Some of the bigger dairies which did not sell to brokers and so would not be affected by their elimination, did not favor Articles 31 and 34 of the contract, but did not make a very strong opposition thereto." (R. 824.)

Eleventh line from the bottom—change to read: "He recalls that several contracts were framed during the negotiations, but the finished contract * * *." (R. 418.)

Insert after the sentence ending on the fourth line from the bottom the following: "Some of the dealers were and still are dissatisfied with the contract and discussed it among themselves." (R. 420.)

15—Sixth line from the bottom—change to read: "was sent to the milk dealers to meet at the Statler Hotel to see if they could not negotiate a different kind of contract than the one submitted by the Union." (R. 431.) Omit the words "for acceptance of the contract as an industry."

18—Last line of Mr. Manfredi's cross examination by Mr. Corrigan—change to read: "farmers or Cooperative milk companies." (R. 450.)

Fifth line of Mr. Manfredi's cross examination by Mr. Miller—insert after "Cleveland" the following: "but there would still be some dealers selling below others and you could never get an established price. To do so would be illegal." (R. 451.)

19—First line of cross examination by Mr. Corrigan to read: "Witness claims to have no contract with the Union and can but would not sell to brokers.

Witness compares the broker to an ambulance-chasing lawyer, since they go out and steal business." (R. 454 and 455.)

23—Third from bottom line of cross examination of Harry Townsend by Mr. Corrigan—insert: "who deliver the same kind of milk and in the same kind of bottles as are sold to brokers." (R. 491.)

24—Third from bottom line of cross examination of Jacob Simon by Mr. Corrigan—change "1935" to "1939." (R. 511.)

26—In the fourteenth line from the top insert the following sentence: "The Union is not stopping the broker, but was asking the employers who are doing business with the Union to employ union men to deliver their product." (R. 531.)

Change the portion on page 26 beginning "The brokers cannot get a supply of milk * * *" down to "the men would have to work for wages," and substitute the following: "The witness claims that the Union's demand would not eliminate the broker since the broker can buy from a non-union dairy. The Union does not have a contract with substantially every dealer or dairy in Cleveland." (R. 533 and 536.) The Union wanted the broker to work under wages and hours provisions, the same as the rest of the union membership and do work under the same conditions. In order for Simon of the Clover Leaf Dairy Company to keep his brokers, he would have to put the men into the Union. The men would have to work for wages to join the Union." (R. 533 to 536.)

27—Eliminate the portion beginning on the fourteenth line from the bottom as follows: "Witness states * * *" down to the second line from the bottom "obtaining equal pay for the employee" and substitute therefor the following: "The Union had a lad at the meetings taking notes for it. (R. 540.) The Union fought for Articles 1 and 34 right along. After numerous meetings, the employers and employees were deadlocked, and Mr. Corrigan entered the proceedings and started from scratch to make an agreement. They advised Mr. Corrigan

that the Union wanted a closed shop and the right to deliver all the milk. The question of legality was referred to Mr. Corrigan, but the witness does not know who raised this question. (R. 545-6.) Brokers do not sell as cheaply as some dealers. (R. 547, 550 and 553.) Advertising is an item of cost entering into the price of milk. The broker is a competitor of the dairy and of the union driver. (R. 549.) The witness does not know who establishes the price of milk in Cleveland, but thinks that the newspapers establish the only recognized price. There is, however, no regularity in price, and no two dealers have the same cost. (R. 551 and 552.) The elimination of the broker as a help to the dairies was not discussed during the negotiations. The main topic of discussion concerned the closed shop and wages and obtaining equal pay for the employees." (R. 555.)

28—Ninth line from the top—insert the following: "The respondent Union's Exhibit A was the contract drafted by the Union and presented to the dairies prior to the negotiations. (R. 558.) Articles 1 and 34 of the final contract were drafted during the negotiations (R. 560), and are the two articles which pertain to brokers."

Eliminate the sentence immediately before Mr. Seckler's cross examination which reads: "Witness gives it as his interpretation * * * would be eliminated," and substitute therefor: "The brokers are not eligible to join the Union since they are not working for wages. The big argument in the negotiations was that the Union wanted all the work from employers for its members." (R. 565, *et seq.*)

Insert the following after the word "contract" in the tenth line from the bottom: "after sending notice of its election to terminate the existing employment contract on September 30, 1937, the Union sent out a form of contract, which is the Union's Exhibit A, to all employers, this being the contract which the Union demanded." (R. 567.)

After the word "milk," in the fifth line from the bottom, insert: "This was the big argument all the way through." (R. 569.)

In the third line from the bottom insert the following: "The Union originally demanded a check-off, but the present contract contains no provision therefor. The Union had also been fighting for years for a closed shop." (R. 570.)

Add at the end of Mr. Seckler's cross examination: "All members of the Union Committee had insisted upon Article 34. Mr. Corrigan, attorney for the Union, emphasized this demand." (R. 573.)

30—Change the last sentence of Mr. McElroy's cross examination to read: "He does not now wear the uniform or cap of the Old Valley Dairy, but used to do so." (R. 618.)

32—First sentence of cross examination of John T. Bocan should read: "His wagon bears the name and color scheme of the Hillside Dairy, and he has increased his customers from thirty-five to two hundred seventy-five." (R. 836.)

In the last sentence of Mr. Bocan's cross examination change the word "permits" to "merely provides that." (R. 841.)

Last line on this page to read: "Trucks carry the Hridel sign on them in big letters and his name on the door of the truck in little letters." (R. 854.)

33—Change the sentence beginning on the second line of this page to read: "His trucks are cream and red, Hridel's trucks are now cream and black, but used to be the same color as his; the new truck which the witness has bought is the same color as the present Hridel trucks." (R. 855.)

Add the following to the direct examination of Norman Wolf: "In two years he has increased his customers from twelve to one hundred seventy-five. He meets and competes with drivers for various dairies." (R. 875 and 876.)

153—Bottom of page—add the following: "The Union would not be a party to, nor let itself be used as an instrument whereby any dealer could force a

broker to sell out, but instead the Union would do everything to secure an equitable adjustment." (R. 954 and 955.)

We have, for convenience, indicated pages of the transcript of evidence which we believe demonstrate that the amendments suggested accurately conform to the evidence given. We reiterate, however, that, as was found by the Court of Appeals, the only question presented by this case is a question of fact; namely, the primary purpose of the respondents in negotiating and entering into the employment contract. The petitioners claim that that purpose was an unlawful one of driving the petitioners from business, and that discussions of all other matters were merely a camouflage to conceal the true objective. The respondents claim instead that the primary purpose and chief objective of the negotiators was to adjust a valid and sincere labor controversy. While it may be that discussions of starting times, rights to discharge employees for certain wrongs, wages of plant employees, allocation of routes and similar matters have no direct bearing upon the petitioners, such discussions as well as the length of time devoted to discussions of these matters indicate clearly that the respondents were sincerely and vitally interested in these and many other items entering into the employment contract, and were not spending their time in acting in the manner in which they did in a mere attempt to camouflage their chief objective. Certainly, in the absence of evidence to the contrary, it will not be presumed that a group of fifteen or twenty reputable men spent weeks in discussing and negotiating various items of an employment contract containing nearly forty sections in a mere attempt to hide and conceal their chief objective which forms the subject matter of only one or two paragraphs. Consequently, the whole situation can be more accurately ascertained by an examination of the Exhibits 5-A to 5-U which contain verbatim everything which was said by the representatives of labor and of the

employers in formulating and negotiating the contract in question. The petitioners examined these Exhibits and read therefrom into the transcript of testimony only those excerpts which they believed had a direct effect upon them, and then, as true advocates, probably chose those portions considered to support their claims. In spite of this, however, we believe that even the excerpts so chosen by the petitioners will refute their contentions and establish that the respondents acted for the purpose of accomplishing a lawful object through the use of lawful means.

Respectfully submitted,

RAYMOND T. JACKSON,
CLAYTON A. QUINTRELL,
Counsel for Respondent.

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 354.

RAY RITTER, *et al.*,
Petitioners,

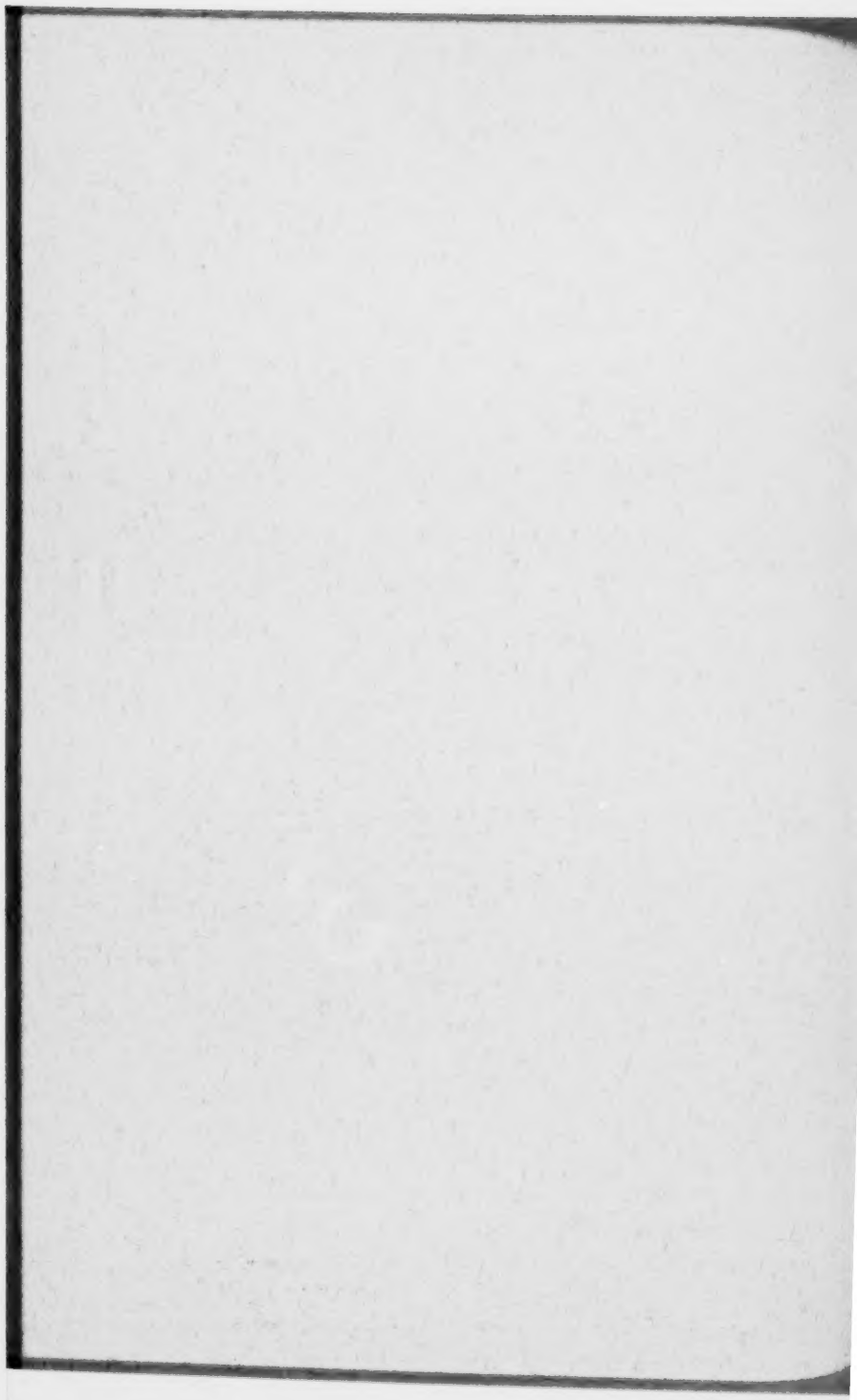
vs.

MILK AND ICE CREAM DRIVERS AND DAIRY EMPLOYEES' UNION, Local 336, *et al.*,
Respondents.

**BRIEF OF RESPONDENT,
MILK AND ICE CREAM DRIVERS AND DAIRY EMPLOYEES' UNION, LOCAL 336,
IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.**

WILLIAM J. CORRIGAN,
2025 N. B. C. Building, Cleveland, Ohio,
Attorney for Respondent, Milk and Ice Cream Drivers and Dairy Employees' Union, Local 336.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO



INDEX.

Authorities Cited.

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 354.

RAY RITTER, *et al.*,
Petitioners,

vs.

MILK AND ICE CREAM DRIVERS AND DAIRY EMPLOYEES' UNION, Local 336, *et al.*,
Respondents.

**BRIEF OF RESPONDENT,
MILK AND ICE CREAM DRIVERS AND DAIRY EMPLOYEES' UNION, LOCAL 336,
IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.**

"A thoughtful consideration of all the facts and circumstances of this case compels the inescapable conclusion that the plaintiffs have not sustained their burden of proof. The inferences and conclusions drawn have the element of plausibility but fall short of establishing the probability of their claims.

"On the other hand, the claims of the defendants that this contract expresses the terms of settlement of a genuine labor dispute, adversarily negotiated and concluded, seem to be supported by the greater weight of the evidence."

Opinion of the Court of Appeals.

FACTS.

It is the claim of the plaintiffs-appellants that the contract that was entered into between Local Union No. 336 and *some* of the dairies of Cleveland, Ohio, was for the purpose of carrying out restrictions in trade, preventing competition, controlling and maintaining the price at which milk was to be sold, and the creating of a monopoly in the marketing of milk.

We wish to call special notice to the fact that this contract, by its terms, expired on September 30, 1938, "unless written notice of a contrary intention was given by either party thirty days prior to September 30, 1938, or any year thereafter." Such notice was given by many of the contracting parties, and as a result their contracts expired September 30, 1938, and were not renewed.

Local No. 336 is a labor union composed of driver salesmen who deliver dairy products to stores and homes, and inside dairy workers who prepare the dairy products for delivery.

This union, as like organizations, is established to enable the workers through collective action to obtain and maintain fair hours, working conditions, and wages.

In 1922, the Milk Drivers' Union of Cleveland, Ohio, was wiped out of existence by a disastrous strike. From that date until 1933, a strong employers' organization prevented unionization among the workers.

In 1933, due to the enactment of the NIRA, a small, struggling, ineffective union made its appearance.

During 1933, and the early part of 1934, efforts were made to bring the union and various employers together for the purpose of working out a trade agreement. In line with these efforts, in the spring of 1934 the union sent a letter to each dairy requesting that a representative attend a meeting at the Hollenden Hotel, at which meeting reasons for unionization of the employees would be presented. About one hundred and twenty-five dealers attended the

meeting, and as a result, the employers selected a committee to meet with the union to determine if an agreement could be worked out that would serve as a standard for the industry. After a series of meetings which consumed several weeks' time, the two committees agreed on a contract. The dealers' committee recommended it to the industry as the best terms that could be agreed upon, and the union's committee likewise recommended it to the rank and file of the union.

The contract was then presented to each dealer separately, with the result that a number of dealers in the city accepted the contract and agreed to the terms thereof. The acceptance was made by each dealer individually. There was no collective acceptance of the contract. Like contracts were negotiated in 1935 and 1936. The contract negotiated in 1936, by its terms, expired September 30, 1937.

None of the contracts negotiated were satisfactory to the union, but were accepted as being the best bargain that could be obtained under the prevailing circumstances. The employers were at all times reluctant to enter into a contract, and did so only because they feared the growing influence of the union and the possibility that failure to contract would result in a strike.

The main and most difficult problem to be negotiated and settled in each contract was the question of wages, and from the union viewpoint this question of wages had been unsatisfactorily negotiated in each contract.

From the first meetings of the union committee and continuously throughout negotiations, the union presented a claim to wages based on an hourly or weekly rate. This method of paying wages the employers admitted applied to the inside workers, but resisted every attempt to apply it to the driver salesmen. The employers claimed that the driver salesmen were the means, and practically the only means, whereby the employer had contact with his cus-

tomers; that it was through the driver salesmen that the dairy products were sold; that the increase in business and retention of business depended principally upon the driver salesmen's efforts. They further argued, that the driver salesmen, in order to carry on their work properly, must have a definite incentive, and to supply this it was necessary that they be paid on a commission basis on the goods sold and collections made; that this method caused the driver salesmen to be on the lookout for new customers and thus expand the business of the dairy as well as increase their earnings; that securing their pay on the commission basis the drivers would be careful to give good service to the customers and thus retain good will for the dairy as well as receiving commission from each particular sale. The employers further argued that if daily, hourly or weekly wages were paid the drivers would become mere delivery men, and that the dairy consequently would suffer loss of business.

The union never succeeded in forcing the employers to recede from this position, and reluctantly each year the wage scale for the drivers was based on commission for goods sold and collections made.

During the three years that this method of payment was in effect the union constantly complained that it was a system by which they were defrauded and cheated. The union, in negotiating this wage contract, was endeavoring to establish a living wage, and a wage that would be proportionately the same for each driver salesman, the amount differing only as the number of customers served by each driver was greater or less.

But the union learned through experience that instead of fixing a uniform rate, they had assisted the employers in setting up a system whereby the driver salesmen were receiving for the same work as many rates of pay as there were dairies in the city. The reason for this variety of pay was due to the fact that the union, in ac-

cepting the commission method of pay, were under the impression that their commission would be paid on the price of milk which was general and established, such as eleven cents or twelve cents a quart. The dairies, instead of paying the driver on the established price of milk, paid commission based on the actual price at which they sold their products.

There is in this industry no established price for milk. One dairy sells milk for eleven cents, another for eight and one-half cents, another for nine cents, some four quarts for thirty-two cents and so on. Some dairies engaged in price wars, and milk was sold as low as three cents a quart. Many dealers were giving various kinds of discounts to customers, especially to those who bought wholesale.

These prices and various methods of getting customers is due to the sharp competition that exists in the dairy industry. In this way the driver salesmen became the victim of the competitive prices that dealers inaugurated to secure business from their competitors, and the dealers insisted that under the contract they would pay commission on the price of goods sold, no matter how low that price might be.

This resulted in a growing dissatisfaction on the part of the members of the union, and when the contract which was to expire on September 30, 1937 approached the expiration date, the union notified all employers with whom they had a contract that the union would not renew the contract.

The union then appointed a committee of about thirty-five members who drew up a contract, a copy of which was mailed to each employer in the Cleveland area. A copy of that contract is among the exhibits introduced by the plaintiffs. This new contract, among other things, demanded a closed shop—all previous negotiations had been on an open shop basis. It called for limited hours, and pay based on an hourly or weekly rate for the drivers.

As a result of this action on the part of the union a number of the employers met, and this group of employers, which by no means included all the employers in the industry, appointed a committee to meet with the union. This committee had no power to negotiate a contract. It was to meet with the union committee and report back to the employers group what terms the union would accept. (R. page 318.)

The union appointed a committee which was likewise without power to negotiate a contract other than the one that had been mailed by the union to the dealers. The union committee was instructed to enforce the demands made in the contract which had been drawn up by the union committee of thirty-five members, and was further instructed to make no concessions without securing the approval of the rank and file. (R. page 187.) These committees met from early in September until October 5, 1937. Many sessions were held and each session lasted a number of hours.

The principal difficulty between the two groups, and which seemingly was unsurmountable, was the commission method of pay, as advocated by the dealers, and the weekly or hourly method of pay as advanced by the workers. Due to their previous experience with the commission method the union refused to make any concessions, so that the time was spent from the beginning until the last meeting on October 5th principally on this one phase of the contract. The two committees, during that period, had accomplished nothing except perhaps agreement on some inconsequential things.

During the week of October 5th, 1937, the two committees disagreed to such an extent that it was considered futile to hold any further meetings, and on Friday, October 8th, the union voted a strike which was to begin at midnight Monday, October 11.

Both sides prepared for war. The union made every necessary provision to make the strike effective, and the dealers made ready to meet them. A milk strike, unlike other strikes, cannot be localized. Such a strike affects the people generally, and as a consequence the entire community was interested in the position taken by both the employers and the union, but to no avail; the strike seemed to be the only way out.

On Saturday, October 9, and Sunday, October 10, a member of the bar, known to both parties, made an effort to have the two committees resume negotiations so that a strike could be avoided.

As a result, the parties agreed to meet. The union, however, refused to call off the strike and insisted that if the contract was not settled by midnight Monday, October 11, the strike would go on. The two committees met on Monday, October 11, from 2:00 P. M. until 11:00 P. M. At that time it became necessary for the committees to adjourn in order that the committee representing the dealers might consult with a group of dealers for the purpose of securing authority that the committee did not possess, and as a result of this necessary adjournment the deadline for the strike was moved back to the next day.

So greatly interested was the public in what the committee would do on Monday, October 11, that representatives of all the newspapers and an out of town correspondent stood outside the door waiting for the final word, and when the committees adjourned and the statement was made that there would be the usual delivery of milk the next day, all the broadcasting stations of Cleveland broke into the regular programs and made the announcement.

When the meeting was called to order the next day and it was admitted by both sides that nothing of importance had been agreed upon, it was suggested that the committees start again as though no meetings had been held. The member of the bar remained with the group un-

til the final draft was made that was acceptable to the union committee.

The final draft is the contract that is in evidence in this case, and was the result of meetings that took place from October 11, and through the remainder of the month of October and part of November. This draft was not acceptable to the employers' committee, but they were instructed by the union that unless employers accepted this contract the strike would go on as originally planned, so that the employers were face to face again with the legal weapon possessed by labor unions to enforce demands.

The employers' committee reported to the dealers' group the result of the conferences and informed the group that the contract which had been negotiated subsequent to October 11 was the best that could be obtained and that the employers could sign it or not as they choose, but that the committee could do no more. (R. page 318.) The contract was then sent to each dealer in the city with the demand that it be signed. Some dealers signed it at once, others refused to sign it, and others signed it after a time, with reluctance.

ARGUMENT.

> "It is our conclusion that Section XXV of the contract is not a price-fixing but purely a wage-fixing provision. It is an attempt to standardize the wages at a uniform rate for the drivers, dependent to some extent upon the energy and industry of the individual driver. The Dealer may sell his product for whatever price he chooses without any restriction or limitation imposed by this Section, but the wages are calculated upon a uniform and fixed basis."
>
> Opinion of the Court of Appeals.

There is no evidence in this record and no evidence can be produced that the Milk Drivers' Union entered into a conspiracy with the dealers, or any dealers, as alleged in the petition.

The transcript of what was said at all the meetings, both those prior to October 11 and those after October 11 has been introduced in evidence. This is the part of the record that petitioners move to dispense with printing. The entire record shows that not only was there sharp disagreement between the negotiators for the union and those for the dealers, but there was present the bitterness, hostility, and emotionalism that is usually present in the meetings involving the subject matter that was under discussion between these two groups. (R. page 927.)

We use the word "contract" in referring to the result of the negotiation between these two groups. The word, however, must not be accepted herein in its literal meaning; rather, this paper-writing establishes a standard that the employers would accept if they employed members of the union.

Among other things the contract provides for a closed shop. The question is raised as to the legality of a closed shop. However, the legality of a closed shop has long ago been established in industry. The principle was recognized many years ago in Ohio in the case of *Local Branch No. 248, et al. vs. Solt,* 8 O. App., 437, wherein the court held, Syllabus 1:

> "Where the owner agrees to the exclusive employment of union labor in the construction of a proposed building, and union workmen acting and relying thereon have accepted employment, the subsequent employment of a non-union workman for the execution of a branch of the work is a violation of the owner's agreement, and a mere threatened withdrawal by the union workmen or by the union in their behalf, in the event that the non-union workman is not discharged, is not illegal."

And at page 440:

> "The recent cases sustain the validity of contracts made by the employer for the exclusive employment of union labor, particularly where the

> supply of union labor is adequate or where provision is made for the unionizing of workmen in case of shortage. *Natl. Fireproofing Co. vs. Mason Builders' Assn.*, 169 Fed. Rep., 260; *Jacobs vs. Cohen*, 183 N. Y., 207; *Mills vs. U. S. Printing Co.*, 99 App. Div. (N. Y.), 605; *Hoban vs. Dempsey*, 217 Mass., 166, and 16 *Ruling Case Law*, 426."

And as to the closed shop violating Anti-Trust Laws, we refer the Court to *Oakes' Organized Labor and Industrial Conflicts*, 237 (Closed Shop Agreements), para. 228:

> "It has been held that an agreement between an employers' association and a labor union, whereby the employers' association agrees to employ none but members of the union, and the union agrees that it will give preference to requests made by members of the employers' association for men, over similar requests made by nonmembers, imposes no such direct restraint upon interstate commerce as to render it violative of the Federal Anti-Trust Act; and that a contract between an employer and a labor union that only members of the union shall be employed cannot be regarded as a matter of law, as violating the state Anti-Trust Law." (See *Belfi vs. United States*, (1919; C. C. A. 3d C.) 170 C. C. A. 662, 259 Fed. 882 (obiter). *Goyette vs. C. V. Watson Co.*, (1923) 245 Mass. 577, 140 N. E. 285.)

The only time the principle of closed shop has been questioned in Ohio has been "when it includes an *entire* industry so as to operate generally in the community, preventing workmen from obtaining employment under favorable conditions without joining the union." *Polk vs. The Cleveland Railway Co.*, 20 O. App., 317. *Scaggs vs. Transport Workers Union of America*, cited by the plaintiffs-appellants, is based on the *Polk* case.

The right of persons who are not parties to the making of a closed shop agreement is analyzed in *Oakes'*

Organized Labor and Industrial Conflicts, 237 (Closed Shop Agreements) para. 224:

> "One employer cannot enjoin other employers from entering into closed shop agreements with a union; and an agreement between employers and a labor union, freely entered into with a view to advancing the respective interests of the parties thereto, that all work of a specified kind shall be given to members of the contracting union whenever such men are available, is not so illegal that performance may be enjoined at the instance of persons not members of the union, although its effect is to diminish their possible employment." (See *Finnegan vs. Butler* (1920) 112 Misc. 280, 182 N. Y. Supp. 671. *Hoban vs. Dempsey* (1914) 217 Mass. 166, L. R. A. 1915A, 1217, 104 N. E. 717, Ann. Cas. 1915C, 810. See also *Meyer vs. Journeymen Stonecutters' Asso.* (1890) 47 N. J. Eq. 519, 20 Atl. 492, holding that the courts will not interfere at the instance either of employers, or of workmen who are not members of a labor union, with the action of such union in resolving not to work with any but members of the union, or for any employer who should insist on their doing so.)

The employers desired to continue the open shop, but had to submit to this demand of the union for the closed shop. The contract provides for a wage rate based upon commission. The employers never receded from their position even in the face of strike in regard to the method by which the driver salesmen should be paid. The demand made in the beginning by the union, that the drivers be paid at an hourly or weekly basis, was overcome by the demand of the employers for the commission method of payment, and which was so disastrous to the union workmen. It was conceded only after the employers agreed to remedy the evils to which the union had been subjected.

Article XXV of the contract requires the employers to pay commission on a fixed rate so that now it makes no difference to the driver salesmen what price the em-

ployer receives for his product, what discounts he gives, what price wars he wages. Members of the union delivering milk are paid the same commission regardless of where they are employed. While this Article fixes the wages for the driver, it in no way can be construed to fix rates which the distributor shall charge for his product. He is free to sell his milk at any price he chooses, to give it away, or to dump it in the gutter. This is not price fixing, it is wage fixing.

The union, in accepting the commission method and waiving their demands for an hourly and weekly wage, insisted that all delivery of dairy products, which in the main means the delivery of the employers' bottled milk, be carried on exclusively by the members of the union. (Article XXXIV.)

The evidence discloses that a number of employers distributed their product in two ways. First, through members of the union; and second, by sale at the platform of their bottled milk to independent distributors, commonly called peddlers or brokers.

The evidence discloses further that these distributors work seven days a week, unlimited hours, employ helpers who are not members of the union, determine their own profits. The bottled milk which they purchase bears the label and the cap of the dairy. They distribute their milk in trucks having the color scheme and bearing the name of the dairy, and in all respects is similar to the trucks from such dairies that are operated by members of the union. There is nothing to distinguish their equipment or the products delivered by them from the equipment and the product delivered by the union driver, except that the peddler's name is printed on the panel of the truck.

These distributors deliver the product on the same streets where the union member is required to sell. Working all days of the week, fixing their own price, employing cheap help, it is not difficult to see why such distribu-

tors have an unfair advantage over the union member who works limited hours, and whose price is fixed by the employer.

Each bottle of milk delivered by the broker from a dairy where a union driver is paid on commission, means to the union member that much less pay. Thus, in line with conceding to the demand of the employer that the union work on a commission rate, the union demanded that they be subjected to no unfair competition such as was represented by delivery through independent distributors.

There is no reason to spend a great deal of time attempting to secure an interpretation of Article XXXIV. Its meaning is plain and never has been denied by the union. If a dealer signs with the union this closed shop contract, the union agrees to work on commission, and the employer agrees to give the union driver the exclusive distribution and sale of his dairy products. If an employer distributes his products in any other way than through the members of the union then he violates the contract. If an employer delivers through brokers he has the choice either to retain that method by refusing to sign the contract, or by eliminating the brokers from the distribution of his bottled milk by signing his contract. Some dealers have chosen to sign the union contract, others have not.

In view of the state of the evidence, it is ridiculous to say that this contract creates a monopoly or that the plaintiffs are prevented from obtaining a supply of milk. The evidence discloses, clearly, that milk is obtainable in any quantity, that there is no restriction on its purchase, or on the equipment necessary to equip or maintain a dairy or a milk route. There is no restriction on pasteurization or bottling of milk, or the machinery necessary for the same. There is no restriction on the purchase of bottles, of caps, boxes, or any other equipment necessary to maintain a route. (R. pp. 620 *et seq.*)

The entire complaint of the plaintiffs is that this contract shuts off the entire source of bottled pasteurized milk to the plaintiffs. This is quite contrary to the proof. Not only is that true which we have said about the ability of plaintiffs to obtain a supply of milk, but the evidence discloses that bottled pasteurized milk is obtainable to the plaintiffs from many sources.

Plaintiffs have not attempted to prove that all the sources of bottled, pasteurized milk are closed to them. They have contented themselves to introduce contracts between the union and *some* employers, but there does not appear in the record anything that will show this Court that *all* sources of supply of bottled, pasteurized milk are closed or could be closed by this contract. The record discloses that the union does not have contracts with the following:

Fairmont Creamery Co.
Buckeye Heights Dairy Co.
Burns Dairy Co.
Edna Dairy Co.
Lyon Dairy Co.
Rosedale Dairy Co.
Willow Farms Dairy
Ansel Dairy
Harper Creamery Co.
Midland Dairy Co.
East 66th Street Dairy
Sunny Brook Dairy Co.
Cleveland Pasteurized Milk Co.
Kniesner Dairy Co.
Barth Dairy Co.
Trejbal Dairy Co.
Richfield Farms, Inc.
Hillcrest Dairy Co.
Malec and Marek Dairy Co.
Mt. Pleasant Dairy
Balazs Dairy Products
Grand Dairy Co.
Filo Dairy
Suncrest Dairy
Woodhill Dairy
Avon Dairy
South End Dairy
Market Square Dairy
Sunrise Dairy
Melrose Dairy Co.
Bush Dairy
Kenmore Dairy
Corlett Dairy
Tischler Dairy
Jersey Dairy
Surgala Dairy
Sunshine Dairy
Jordan Dairies
Swiss Dairy
Lakewood Dairy
Lawn Dairy
Ideal Dairy
Hridel Dairy
Lincoln Heights Dairy
R. G. Morris Dairy

Race Dairy
Maple Heights Dairy
Home Dairy Products
Hercl Dairy
Portage Dairy
West Side Dairy
Mound Dairy
Oberlin Farms Dairy
West End Dairy
Independence Dairy
Manfredi Dairy
101 Farms Dairy
Miller Dairy Co.

(R. page 905.)

The milk business is open to any one who desires to engage in it, in fact, several witnesses testified that in recent years they started in business from scratch. If a person goes into the milk business and equips a dairy, buys his milk from the farm, pasteurizes it, puts it up under his own labels and in his own bottles, by what authority can he be compelled to distribute his product through any certain agency?

We do not think it is necessary to cite authorities that an owner of dairy products may sell his milk and cream to whomever he chooses or may refrain from selling them to any one he chooses as long as he does not enter into a conspiracy with others.

The best that can be said of plaintiffs' position is that when *some* employers signed this contract with the union, *some* of the sources of bottled, pasteurized milk were closed to the plaintiffs. This is also clear, that the signing of the contract by *some* employers *does not* shut off the source of *all* bottled, pasteurized milk, nor does it shut off the source of *any* unpasteurized milk, or interfere with *any* arrangement that the plaintiffs may enter into to secure milk and have it pasteurized and bottled.

The rule to be applied in this case is not that found in most of the cases cited by the plaintiffs-appellants. A very cursory examination of most of those cases will convince the Court that they have nothing to do with the Anti-Trust Laws, but revolve around strikes, picketing, boycotts, lockouts and industrial disputes between employers and employees.

The guide for business laid down by Ohio Supreme Court, and which applies to the facts and circumstances in this case is found in *List vs. Burley Tobacco Growers' Co-operative Assn.,* 114 Ohio St., 361, Syllabus 4:

> "Contracts in restraint of trade are not illegal except when unreasonable in character. When such contracts are incident and ancillary to some lawful business and are not unreasonable in their scope and operation they are not illegal."

Ever since the *List* case has been decided, it has been followed by all the courts of this state, particularly in the following cases:

Robey et al. vs. The Plain City Theatre Company, 126 Ohio St., 473, Syllabus 2:

> "A contract in restraint of trade, in which the restraint is partial only, reasonable and not oppressive, and in which a valuable consideration has passed between the parties, is one which the law will enforce."

The Stark County Milk Producers' Assn. vs. Tabeling, d.b.a. The Massillon Pure Milk Co., 129 Ohio St., 159, Syllabus 2:

> "A contract between such an association and a milk dealer or distributor by which the latter agrees to buy all milk for his business from producers who are members of the association, at prices, and to sell under classifications, to be mutually agreed upon by him and the marketing department of the association, and to pay a portion of the proceeds of his sales to the association for the purpose of maintaining a pooling fund and a blended selling price among dealers, with the ultimate purpose of securing to each producer a uniform price for his milk regardless of the price at which it is sold, is not void as against public policy, or in violation of the anti-trust laws of the state of Ohio, unless such contract, in its restraint of trade, is unreasonable as to character, scope or operation (*List vs. Burley Tobacco*

Growers' Co-operative Assn., 114 Ohio St. 361, approved and followed)."

And at page 173:

"The test for determining whether a covenant in restraint of trade is reasonable or not is to consider whether the restraint is no greater than is sufficient to afford a fair protection to the interests of the party for whose benefit it is made and at the same time not so large as to interfere with the interests of the public."

H. Lipman & Sons, Inc. vs. Brotherhood of Painters, Decorators & Paper Hangers of America, 30 Abs., 435:

"* * * And the more recent decisions have construed the Sherman Act, as applied to combinations of capital, so as to limit its denunciation to those combinations that unduly restrain trade or commerce. The statute is now construed according to the 'rule of reason' and to prohibit combinations that are intended to directly restrain trade or commerce, or which necessarily have that effect, and excludes combinations for another and lawful purpose which only incidentally and indirectly impose such restraint. Such is the character of the restraint upon trade or commerce of this association of employes.

"In *Standard Oil Co. vs. United States,* 221 U. S. 1, at 66, the court said:

" 'If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct. This is true, because as the construction which we have deduced from the history of the Act and the analysis of its text is simply that in every case where it is claimed that an act or acts are in violation of the statute the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be

applied. From this it follows, since that rule and the result of the test as to direct or indirect, in their ultimate aspect, come to one and the same thing, that the difference between the two is therefore only that which obtains between things which do not differ at all.'

"This rule, for the interpretation of anti-trust statutes, was approved and applied to the Valentine Anti-Trust Act in *List vs. Tobacco Growers' Co-operative Assn.*, 114 Ohio St., 361, the 4th paragraph of the syllabus of which is:

" 'Contracts in restraint of trade are not illegal except when unreasonable in character. When such contracts are incident and ancillary to some lawful business and are not unreasonable in their scope and operation they are not illegal.' "

And has also been approved and followed in *Earley vs. Co-operative Pure Milk Association, et al.*, 115 Ohio St., 185, and *Brannan vs. Ohio Poultry Producers' Co-operative Association*, 27 Ohio App., 426; and cited with approval in *Liberty Warehouse Co. vs. Burley Tobacco Co-operative Marketing Association*, 276 U. S., 96; 72 L. Ed., 483, and *Metropolitan Co-operative Milk Producers' Bargaining Agency, Inc. vs. Rock Oil Co-operative, et al.*, 307 U. S., 563; 83 L. Ed., 1464.

We also wish to call the attention of the Court to the following Ohio authorities which justify the contract that is the subject of this action:

27 *Ohio Jurisprudence*, page 162, Sec. 3:

"However, it is not every restraint of trade which the law prohibits, for many transactions which no one questions may be seen to have some effect in reducing competition or affecting prices. In general it is the substantial and direct restraint which is condemned rather than the one which is merely incidental to some lawful transaction."

27 *Ohio Jurisprudence*, page 168, Sec. 9:

"It is conceded that there are contractual rights, with reference to the use of one's property and faculties

which the general assembly is powerless to destroy. So, as to transactions prohibited, the Valentine Act is not to be construed literally, but according to a rule of reason. It is declaratory of the common law, and not to be construed as prohibiting transactions not inimical to the public welfare."

Wessell vs. Timberlake, 95 O. S., 21;

Kissenger vs. Columbus Macadam Co., 8 O. N. P., 135.

27 *Ohio Jurisprudence,* page 168, Sec. 9:

"In the interpretation of anti-trust legislation, the trend is toward liberality, and greater tolerance of co-operation in commerce and industry. It has even been said that competition may be reasonable or unreasonable, may promote sane relations between supply and demand, or ruinously place producers at the mercy of consumers and middlemen, the intimation being that the Valentine Act should be construed accordingly."

27 *Ohio Jurisprudence,* page 169, Sec. 10:

"Not every transaction involving some restraint of trade or competition is illegal, for, if such were the case, many transactions which no one questions would be invalid. In general the policy of the law condemns only those transactions which in their effect upon trade, business, or competition are unreasonable; and in any doubtful case, the question, in the last analysis, is one of public policy, to be determined in view of all the circumstances."

27 *Ohio Jurisprudence,* page 172, Sec. 13:

"There seems to be some uncertainty as to the extent to which the rule upholding the validity of reasonable partial restraints imposed upon the sale of a business is applicable to restraints imposed under other circumstances. The doctrine has frequently been referred to as though of general application. Apparently, if the restraint imposed upon one as to his trade or business is ancillary to some lawful transaction, and

reasonable in its limits and effect, it will be upheld; but will not be upheld if it extends beyond the limits of a reasonable adjunct to the main transaction."

Kevil vs. Standard Oil Co., 8 O. N. P. 311, 11 O. D. N. P. 114;

Huebner-Toledo Breweries Co. vs. Zevnick, 8 O. N. P. N. S. 193.

Finally, we claim that the plaintiffs have failed to present evidence that authorized the granting of an injunction. In Ohio the rule is announced in the case of *Spangler vs. City of Cleveland*, 43 Ohio St., 526, 3 N. E., 365, as follows:

" '1. The burden of establishing a right to a perpetual injunction, claimed by a party to an action, is upon such party.

" '2. A court will grant a perpetual injunction only when a party shows a clear right thereto.' "

In the opinion the authorities cited for the above two propositions of the syllabus are the following:

" 'For a perpetual injunction the courts require that there should be no doubt in the case, and that the plaintiff must make out a clear and unexceptional right.' *Dan. Ch.* 1681.

" 'The court will not exercise this necessary authority where the right is doubtful or the facts not definitely ascertained.' *Burnham vs. Kempton*, 44 N. H., 92.

" 'The right must be clear.' *Bonaparte vs. Camden & Amboy R. Co.*, Fed. Cas., No. 1617, 1 Baldw., 218."

Respectfully submitted,

WILLIAM J. CORRIGAN,

Attorney for Respondent Milk and Ice Cream Drivers and Dairy Employees' Union, Local 336.